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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-247 ~~1791~~

LYMAN PRINTING AND FINISHING COMPANY,
A DIVISION OF M. LOWENSTEIN & SONS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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A DIVISION OF M. LOWENSTEIN & SONS,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Lyman Printing and Finishing Company, a Division of M. Lowenstein & Sons, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on March 10, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 437 F.2d 1356. The Decision and Order of the National Labor Relations Board, hereafter referred to as the Board, is reported at 183 NLRB No. 105.[1]

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 10, 1971. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254 (1).

QUESTIONS PRESENTED

1. Has the Petitioner's right of due process been abridged by the Board's application of its summary judgment procedure, which was not adopted in accordance with the notice and publication requirements of the Administrative Procedure Act, since the evidence presented in the related representation proceeding concerned a bargaining unit which was entirely different from the unit finally determined to be appropriate by the Board?

2. Was the Petitioner treated arbitrarily and unfairly by the Board by its application of its summary judgment procedure while at the same time refusing to allow the Petitioner to use discovery to demonstrate existing issues of material fact?

3. Did the Board and Court below depart from and misapply recognized precedent by establishing and permitting a single-department bargaining unit, in a plant

1. The opinions, orders and decisions entered by the Court below and by the Board are set forth in Appendix A, *infra*.

with forty integrated departments, in a manner which discriminates against the Petitioner and the textile printing and finishing industry?

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Sections 8(a)(5) and (1), and 10(f) of the National Labor Relations Act, as amended [29 U.S.C. §151 *et seq.*], and Sections 552 and 553 of the Administrative Procedure Act [5 U.S.C. §551 *et seq.*]. These provisions are set forth in Appendix B, *infra.*

STATEMENT OF THE CASE

Lyman Printing and Finishing Company is a New York corporation engaged in the business of bleaching, dyeing, printing, finishing and otherwise decorating textile fabrics. (A. 250)[2] There are approximately 3,200 employees working at the plant in about forty different departments. (A. 250, 409)

On December 23, 1969, a complaint was issued by the Board alleging that on or about November 20, 1969, and at times thereafter, the Petitioner refused to bargain with the Machine Printers and Engravers Association of the United States, hereafter called the Union, as the exclusive bargaining representative of employees in an appropriate bargaining unit in violation of §8(a)(5) and (1) of the National Labor Relations Act. (A. 57) The Petitioner duly filed its answer denying the commission of the unfair labor practices alleged. Thereafter, the Board's General Counsel filed a motion for summary judgment, contending

2. A certified copy of the record in the Court below has been filed with this Court. Included in that record is the Appendix upon which the parties relied in the Court below. References to the Appendix are designated by their appropriate page number, preceded by "A".

that there was no need for a hearing and that the Board was entitled to a judgment as a matter of law. (A. 68) The Trial Examiner issued an order to show cause why the summary judgment motion should not be granted, and the Petitioner filed its response. (A. 74) In its response the Petitioner sought permission to be allowed utilization of various discovery techniques which it claimed were necessary in order to clarify and amplify the representation case record as well as to demonstrate existing material issues of fact.[3] The Trial Examiner issued a telegraphic order denying the Petitioner's requested applications and motion, stating that a written opinion concerning this order would be contained in his decision concerning the disposition of the motion for summary judgment. On April 13, 1970, he issued his decision granting the General Counsel's motion, as well as detailing his reasons for not allowing discovery by the Petitioner prior to this decision. (A. 124) In granting the motion, he stated that "[i]t is established Board policy . . . not to permit relitigation . . . in an unfair labor practice case of issues . . . litigated in a prior related representation proceeding." (A. 130) On review, the Board affirmed the findings of the Trial Examiner on all substantive issues, and, without any hearing having been held, issued an order finding that the Petitioner had violated § 8(a)(5) and (1) of the Act. (A. 167)

The circumstances surrounding the Board's summary judgment order in this case primarily center upon its action and rulings in the related representation case. These proceedings may be summarized as follows:

On October 30, 1968, the Union filed a petition with the Board requesting that an election be held among all em-

3. The Petitioner accompanied its response with (1) an application to take depositions, (2) a motion to be granted leave to require certain persons to answer written interrogatories, and (3) an application for subpoenas *duces tecum*. (A. 116-119)

ployees in the printing department, excluding the skilled machine printers, which the Union represented in a craft unit at the time the petition was filed. (A. 347) At the representation hearing, the Union was permitted to change the unit it originally sought by amending this petition for an election to include employees in the color department. (A. 182) Thus, the representation hearing was held to determine, among other things, whether a separate two-department unit, at the Petitioner's plant of forty departments, was appropriate for the purposes of collective bargaining. At this hearing the Textile Workers Union of America, AFL-CIO, intervened for the purpose of opposing the unit sought. (A. 177)

Following the representation hearing, the case was withdrawn from the Board's Regional Office for the Eleventh Region and transferred to the Board in Washington, D. C., for decision. On July 14, 1969, a three-member panel of the Board issued its Decision and Direction of Election. (A. 3) In this Decision, the Board held that, while the two-department bargaining unit which the Union sought at the representation hearing was not appropriate for collective bargaining, a single-department unit of the printing department employees would be appropriate. The Board gave the unrepresented printing department employees the opportunity to be included in a unit with the already-represented skilled machine printers, and, thus allowed the Union to transform an existing craft unit into a departmental unit, the type of which is unprecedented in the textile printing and finishing industry. (A. 192, 203) The Petitioner requested that the Board reconsider its decision and stay the election, but the Board refused to do so, and the election, which the Union won, was held on August 13, 1969. (A. 11) The Petitioner filed Objections to the election alleging primarily that it had been conducted in a unit which was

not appropriate, and the Petitioner requested a full hearing. (A. 30) The Board's Regional Director, in his Supplemental Decision and Certification of Results of Election, refused to give the Petitioner a hearing, overruled its Objections, and certified the Union as the exclusive bargaining representative of all of the Petitioner's printing department employees. (A. 42) The Petitioner appealed this decision by the Regional Director to the Board by filing a Request for Review. (A. 47) The Board denied the Petitioner's Request for Review and, in effect, affirmed the Regional Director's ruling on the Petitioner's Objections to the election. (A. 70) After the Board denied the Petitioner's Request for Review, the Union requested that the Petitioner meet with its representatives "for the purpose of negotiating a contract for employees in the unit certified." (A. 71) The Petitioner refused on the ground that the unit in which the election had been held was established ". . . contrary to the statutes, Board precedents, and Industry practice." (A. 72) The Union then filed its refusal to bargain unfair labor practice charge on which the Board's complaint issued. (A. 55, 57) The Trial Examiner granted the Board's motion for summary judgment, finding that the Petitioner had unlawfully refused to bargain with a certified Union in an appropriate unit, and the Board issued an Order affirming the Trial Examiner. On June 26, 1970, the Petitioner filed its Petition for Review of this Board Order in the United States Court of Appeals for the Fourth Circuit. That Court, in a *per curiam* opinion, granted enforcement of the Board's Order. Jurisdiction of the case was conferred upon that Court by Section 10(f) of the National Labor Relations Act, as amended. [29 U.S.C. §160(f)].

The substantive issue before the Court below was whether the Petitioner should be required to bargain with

the Union where the bargaining unit was arbitrarily and capriciously established by the Board without regard for the facts in the record or for recognized Board and judicial precedent. This unit determination is the Board's Decision and Direction of Election reported at 177 NLRB No. 117.

The unit which the Board established in this case is a single-department unit of all employees in the Petitioner's printing department. The total number of production and maintenance employees at the plant is around 3,200. (A. 250) The approximate number of eligible voters in the printing department, where the election was held, was 156. (A. 42) In addition to these unskilled printing department employees, there were about 70 skilled machine printers in that department who were already under contract and represented in a craft unit by the Union. (A. 183) In fact, the Petitioner and Union have had a contract covering these skilled machine printers since 1934. (A. 183)

Excluding the skilled machine printer employees already in the craft unit, the employees in the printing department had a substantial mutuality of interest with employees in the production and maintenance departments throughout the plant. The record showed, for example, that such printing department employees and employees in other departments, (1) used the same parking lot, plant entrance and canteen (A. 304-306), (2) were not required to possess different qualifications (A. 304), (3) worked the same shifts (A. 306), (4) enjoyed the same fringe benefits (A. 305), and (5) were not physically separated from each other. (A. 353) There was much testimony in the record showing that such printing department employees interchanged with employees in other departments to a great degree. (See A. 101) The Petitioner introduced abundant evidence at the hearing showing that the printing

department was functionally integrated into the plant's overall operations. (A. 252-257) Regarding traditional bargaining patterns, the Union's counsel himself admitted that ". . . this case represents a point of departure from its traditional bargaining pattern. . . ." (A. 192) Intervening to challenge the unit sought was the Textile Workers Union of America, AFL-CIO, a union which has traditionally represented the non-craft employees in printing and color departments in the textile printing and finishing industry in plant-wide production and maintenance units. (A. 177, 231-234) The Vice President of the Textile Workers Union testified that unskilled printing department employees are always included in a plant-wide unit, but never in a separate departmental unit. (A. 232) He also stated that the unit sought in the election petition would, if established, ". . . be quite damaging to the Machine Printers Union, the Textile Workers Union and the industry in labor relations." (A. 243)

The Union in this case stated at the commencement of the representation hearing that it wished to represent all employees in the Petitioner's color department, in addition to those in the printing department. (A. 182) Further, this same union has attempted to represent other types of departmental units at other employers' plants in the printing and finishing industry. (A. 197) This piecemeal organization in inappropriate single-department units should not be permitted.

The record contains other important factors, such as those mentioned above, which showed that a single-department unit should not be established, and that, if established, such a unit would disrupt labor relations at the plant. (A. 258) The Board, however, held, with approval of the Court below, that a single-department unit consisting of only printing department employees was appropriate for collec-

tive bargaining purposes. It was this unit determination which led to the Petitioner's refusal to bargain and resultant Board Order, which was enforced by the Court below. Thus, the Petitioner pursued the only method available for challenging the Board's unit determination. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964).

THE REASONS FOR GRANTING A WRIT

I. The failure by the Board and the Court below to properly apply well-established Board and judicial precedent in determining the appropriate unit constitutes such a radical departure from existing administrative and federal law as to call for an exercise of this Court's power of supervision.

An analysis of the decisions by the Board and the Courts, in cases such as the one at bar, reveals that here the Board, with Court approval, has ignored its own decisions and rules governing the establishment of separate departmental units.

In *Mallinckrodt Chemical Works*, 162 NLRB No. 48 (1966), the Board enumerated specific factors to be considered in making craft and departmental unit determinations. Basically, these factors are (1) whether the proposed unit consists of employees constituting a functionally distinct department, (2) what effect establishing the unit will have on existing stability of labor relations, (3) whether employees in the proposed unit have a substantial mutuality of interests with other employees in the plant, (4) the industry bargaining patterns, (5) the degree to which the proposed unit is functionally integrated into the operations of the plant, and (6) the Union's qualifications to represent such a unit.

In establishing the single-department unit of printing department employees, the Board misapplied the *Mallin-*

ckrodt standards. The representation hearing record shows that on almost each factor the Petitioner introduced uncontroverted testimony showing that, under Board standards, a separate departmental unit should not have been established. Moreover, the Board's Regional Director for the Tenth Region decided a case in November, 1968, involving the exact same bargaining unit as the one which was litigated in the case at bar during the representation proceeding.[4] There the Regional Director held that the only appropriate unit was a plant-wide production and maintenance unit. Thus, the Board, in the case at bar, failed to uniformly apply its own standards for determining appropriate units in the textile printing and finishing industry.

Not only did the Board misapply its own standards in making its unit determination, it also disregarded Board and judicial precedent concerning the overall objectives of its unit determinations. In making such determinations, the Board must assure (1) that the employees affected are given the "fullest freedom" to exercise their right of self-organization, and (2) that the unit established must foster stable collective bargaining. *NLRB* v. *Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969); *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962). In the case at bar, the Board considered the will of about 160 employees in one department, but totally disregarded the remaining 3,000 employees in other departments. (A. 4, 42) In the words of the Fourth Circuit, the Board's establishment of such a unit

> ". . . tortures the plain meaning of the Board's prior decisions, eliminates the possibility of effective and stable collective bargaining and imposes the will of a

4. *Swainsboro Printing & Finishing Co., Division of Troy Textiles, Inc.*, 10-RC-7524 (Nov. 26, 1968). The case is not reported in the Board reports, but a copy of the Decision is attached hereto as Appendix C.

> minority on the majority of the . . . employees and deprives the majority of its guaranteed right of freedom of choice." *NLRB* v. *Campbell Sons' Corp., supra.*

The practical effect which collective bargaining turmoil in this departmental unit could have on employees in other departments is serious indeed. In fact, such plant-wide labor instability is highly probable since the unskilled employees in the printing department have always identified with employees in other departments and have shared so many common working conditions.

In deciding that this single-department unit of printing department employees was appropriate, the Board apparently let be controlling the fact that unskilled employees in the department were merely being added to a pre-existing craft nucleus in the department. (A. 8) In doing so, however, the Board reverted to its old *per se* approach in making craft and departmental unit determinations, which is the very type of quick and easy approach which the Board itself supposedly abandoned in *Mallinckrodt.*[5] This Court should exercise its supervision to see that the Board and lower courts make such unit determinations on a case-by-case basis, rather than merely using the always-convenient *per se* approach which was used in the case at bar. The failure of this Court to grant the Writ requested would permit the disruption of existing stable labor relations in the textile printing and finishing industry.

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5. In discussing this "accretion to the craft nucleus" point, the Board relied on *General Motors Corp.*, 114 NLRB 234 (1955), a case which arose prior to *Mallinckrodt* and one in which the Union had traditionally represented similar departmental units in the industry. The instant case, however, arose after *Mallinckrodt*, and the Union has not represented such departmental units in the industry.

II. The Court should decide whether the Board should be permitted to utilize its summary judgment procedure in such a manner as to deny to respondents a hearing and/or opportunity to present evidence, at the unfair labor practice stage, in cases in which the challenged unit, found appropriate by the Board, is entirely different from the unit which was actually litigated by the parties in the prior related representation proceeding.

The Board in this case upheld the Trial Examiner's granting of the Counsel for the General Counsel's motion for summary judgment. (A. 167)

The date of the unspectacular birth of the Board's summary judgment procedure is difficult to pin down. This difficulty arises from the Board's failure to follow the notice and publication requirements contained in the Administrative Procedure Act in promulgating its summary judgment rule. [5 U.S.C. §552 and §553] Summary judgment was used, however, by a trial examiner with Board approval as early as in *KVP Sutherland Paper Co.*, 143 NLRB No. 91 (1963). The Board gave more explicit approval of this technique in *E-Z Davies Chevrolet*, 161 NLRB No. 121 (1966). In both cases the Board based such approval on the premise which this Court expounded in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, that since the appropriateness of the unit was litigated in the prior representation proceeding, the same issues may not be relitigated in a subsequent related unfair labor practice case. This Court has recently again considered this principle, stating that

> "Historically, the representation issue once fully litigated in the representation proceeding could not be relitigated in an unfair labor practice proceeding. We so held in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162." *Magnesium Casting Co.* v. *NLRB*, ... U.S. ....., 76 LRRM 2497, 2498 (Feb. 23, 1971)

Thus, it is this principle, prohibiting "relitigation" of the same issues, upon which the Board bases its summary judgment procedure. It is important to note, however, that this principle was simply not applicable in the case at bar, and summary judgment based on it was unwarranted. Here the Petitioner and the Union litigated the following issue in the representation hearing:

> Is a two-department unit of employees in the Company's printing department and color department appropriate?

In its unit determination, however, following this hearing, the Board held that such a unit was not appropriate, but that a single-department unit of printing department employees was appropriate. (A. 7) Thus, the Petitioner was never given the opportunity to litigate the issue which it sought to litigate for the first time at the unfair labor practice stage; *i.e.*, the appropriateness of the single-department unit established by the Board. Certainly the parties are entitled to present evidence on the issues after they have been formed. In thi instance, however, the issues were not formed until the Board issued its Decision and Direction of Election establishing an unprecedented single-department bargaining unit, which was after the representation hearing had been held. It was extremely unfair to the Petitioner, therefore, for the Board to apply the rule against relitigation in this case. Moreover, the Petitioner has been severely prejudiced by the application of that principle. Because such prejudicial error can and has resulted from the Board's mechanical application of its summary judgment device, this Court should not permit the Board to apply its rule against relitigation in such a fashion where, as in this case, the unit determined by the Board, and challenged by the employer, differs from the one which was at issue and which was litigated in the representation hearing.

III. This Court should resolve the important question of whether the Board should be permitted to deny discovery to respondents in unfair labor practice cases, particularly in such cases where the Board applies its summary judgment procedure.

While the Board now frequently resorts to its summary judgment device in refusal to bargain cases, there is no mention of summary judgment in its Rules and Regulations. The only Board rule relied upon by the Trial Examiner in the case at bar to support his granting of the motion for summary judgment is Section 102.67(f) of the Board's own Rules and Regulations, which states that:

> "The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

This Court has not expressly approved or disapproved of the use by the Board of its summary judgment procedure. Regardless of the legality of the Board's summary judgment device, however, the Petitioner raised an important issue before the Board and the Court below which throws the use of summary judgment in this case into serious question; *i.e.*, should the Petitioner have been permitted to use discovery prior to the Trial Examiner's ruling on the motion for summary judgment. The Petitioner accompanied its Response to the Trial Examiner's Order to Show Cause, why he should not grant summary judgment, with an Application to Take Depositions (A. 116), a Motion to Be Granted Leave to Require Certain Persons

to Answer Written Interrogatories (A. 118), and an Application for Subpoenas *duces tecum.* (A. 119) The Trial Examiner's denial of these applications and motion was adopted by the Board. (A. 168, fn. 2)

The Board has chosen to adopt a summary judgment device similar to that for which Rule 56 of the Federal Rules of Civil Procedure provides. Rule 56(c) of those Rules, however, provides in pertinent part that:

> "The judgment sought shall be rendered forthwith if the pleadings, *depositions, answers to interrogatories, and admissions on file* . . . show that there is no genuine issue as to any material fact." (Emphasis supplied.)

Thus, the federal rules protect federal court litigants from abuses under the device of summary judgment by permitting them to resort to discovery to aid in demonstrating that material issues of fact exist necessitating a hearing. 6 Moore's Federal Practice ¶56.09. If the Board is to be permitted to adopt certain judicial practices contained in the Federal Rules of Civil Procedure, such as summary judgment, this Court should require the Board to also adopt those procedural safeguards provided by those Rules to protect the parties from abuse where summary judgment is used. This Court should require the Board to enter the twentieth century, as far as its procedures are concerned, by not allowing it to simply adopt those judicial procedures which suit its needs while, at the same time, rejecting those necessary safeguarding procedures merely because they may present administrative problems.

The Trial Examiner's decision adopted by the Board contains a separate Appendix explaining why he refused to permit the discovery requested by the Petitioner. (A. 139) In analyzing dicta contained in *NLRB* v. *Southern*

Materials Co., 345 F.2d 240, 244 (4th Cir. 1965) and *Firestone Synthetic Fibers Co.* v. *NLRB*, 374 F.2d 211, 214 (4th Cir. 1967), the Trial Examiner conceded that "at most" such dicta would seem to indicate that the Board is authorized to establish discovery procedures and, in the opinion of the Fourth Circuit, should do so. (A. 152) In *Southern Materials* the Fourth Circuit stated that,

> "[T]he Board, acting in a quasi-judicial capacity as it does, should freely permit discovery procedure in order that the rights of all parties may be properly protected." 345 F.2d 240, 244 (4th Cir. 1967) (dictum).

If the Fourth Circuit is of the opinion that the Board is "authorized" to establish discovery procedures, then the Fifth Circuit has an even stronger opinion on this subject. In two cases, that Court has held that Section 102.30 of the Board's Rules and Regulations[6] provides for the taking of depositions for the purpose of pre-trial discovery. *NLRB* v. *Miami Coca-Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968); *NLRB* v. *Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967), *cert. denied*, 390 U.S. 955. The Second Circuit is in direct conflict with the Fifth Circuit on that point. *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854 (2d Cir. 1970) *cert. denied*, ... U.S. ..... (April 19, 1971). Thus, the Second Circuit is more in line with the Ninth, which has stated that,

> "There is no provision in the [National Labor Relations] Act authorizing the use of discovery procedure." *NLRB* v. *Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951)

The cases in which the courts have considered whether the Board's Rules and Regulations provide for or authorize pre-trial discovery have not considered this question in a context involving the Board's application of its quick-and-easy summary judgment procedure. In a case, such as

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6. See text of the Rule in Appendix B.

the one at bar, where the Board attempts to invoke summary judgment against a respondent, he has much more at stake in pre-trial discovery than merely avoiding surprise at trial. Indeed, discovery prior to ruling on such a motion is his only chance to demonstrate to the trial examiner an existing material issue of fact and thereby avoid final judgment without the benefit of a hearing. In view of the seriousness of the consequences of summary judgment, this Court should require the Board to either interpret its Rules and Regulations as authorizing pre-trial discovery in such cases or to adopt rules permitting such discovery.

Even assuming that the Board's Rules and Regulations permitted discovery by respondents in refusal to bargain summary judgment cases, the Trial Examiner in this case would not have allowed discovery because the depositions and interrogatories were primarily directed to Board officials,[7] and the subpoenas sought Board material. (A. 140-145) Thus, the Trial Examiner stated that the material and information sought by the Petitioner's discovery requests was confidential and privileged in nature and that the Petitioner should not be allowed to ". . . probe the mental processes by which [the Board officials] reached their conclusions." (A. 144) The Petitioner responds to this by suggesting that such objections would be more timely if raised during the taking of the depositions or after written interrogatories had been served, in order that the exact nature of the information sought could be more accurately evaluated in the context of "confidential or privileged" matter.

It is extremely difficult for the Petitioner to demonstrate to this Court the degree to which substantial prej-

7. The Petitioner applied to the Trial Examiner also to take the deposition of the Petitioner's General Manager, J. F. Magarahan. (A. 117)

udice was occasioned on it by the Board's refusal to permit discovery. This is because the value of the information which could have been obtained by such discovery, in demonstrating existing issues of material fact to the Trial Examiner prior to his ruling, is difficult to determine without some minimal knowledge of what information was available. With regard to the Application for Subpoenas *duces tecum,* however, some indication of resultant prejudice is available. In its Application for Subpoenas *duces tecum,* the Petitioner requested but was denied production of any "investigation reports" prepared during the representation proceeding. (A. 119, 163) One such report which the Petitioner may have inspected, had the Application been granted, was a report issued by the Hearing Officer who presided at the representation hearing. In footnote 2 of the Board's Decision and Order in the unfair labor practice case, the Board makes the statement that ". . . [w]e do not adopt the finding [of the Trial Examiner] that the Hearing Officer issued a Report on December 3, 1968." (A. 168, fn. 2). The Trial Examiner, however, expressly found that such a report had issued concerning the representation hearing. (A. 125) The Hearing Officer was the most crucial character during the representation proceedings. His recommendations, if considered by the Board in making its unit determination, must have carried some weight. On the other hand, if his report was not considered by the Board, the Petitioner should be given some explanation why it was not. It does not appear reasonable for the Board to contend that such a report is "privileged or confidential". Had the Petitioner been permitted to examine this report, it possibly could have led to evidence by which an existing issue of material fact could have been demonstrated to the Trial Examiner. It is certainly likely, that the Board's denial of discovery

to the Petitioner has prejudiced its rights by preventing it from examining and utilizing the contents of this hearing officer's report.

Because the Board's summary judgment procedure, in the absence of discovery by respondents, can severely prejudice their rights, this Court should give the lower courts and Board direction on the necessity of permitting discovery in such cases

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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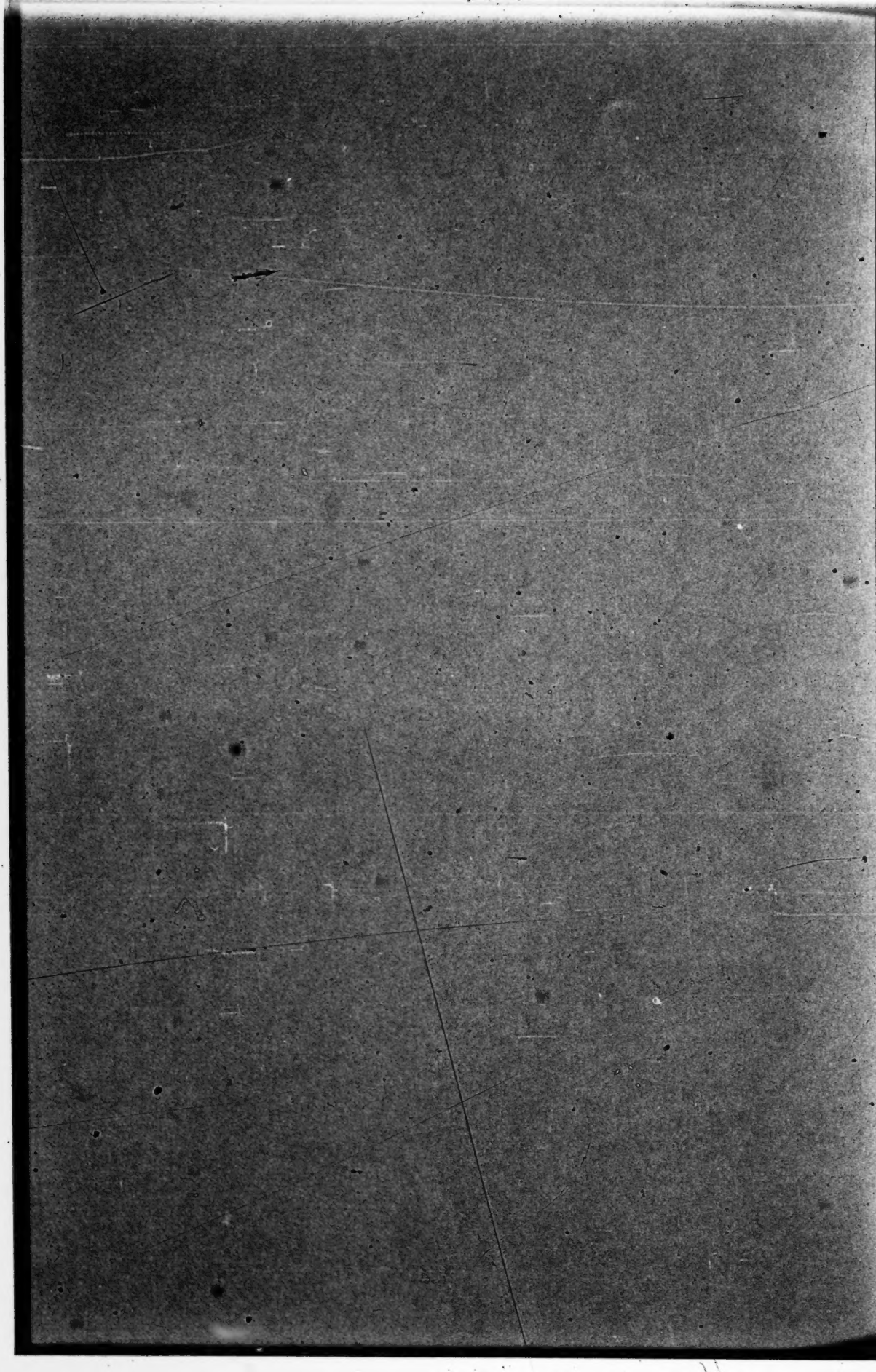

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LYMAN PRINTING AND FINISHING COMPANY A DIVISION OF M. LOWENSTEIN & SONS Employer and MACHINE PRINTERS AND ENGRAVERS ASSOCIATION OF THE UNITED STATES Petitioner	**Case 11-RC-2837**

DECISION AND DIRECTION OF ELECTION

(Dated July 14, 1969)

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Charles M. Williamson, Hearing Officer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer, the Petitioner, and the Intervenor[1] have filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

1. Textile Workers Union of America intervened in order to oppose Petitioner's unit request but indicated that it did not wish to appear on the ballot in any election which may be directed.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Employer is a corporation employing approximately 3,000 production and maintenance employees at its Lyman, South Carolina, plant where it is engaged in the printing and finishing of textile fabrics. The instant case involves the Employer's Printing Division which embraces the following departments: Engraving, Printing, Color, Age and Soap, and Screen Printing. The Petitioner currently represents the employees of the Engraving Department on a departmental basis and a separate craft unit of journeymen and apprentice machine printers in the Printing Department. It now seeks an election among the unrepresented employees of the Printing Department and the employees of the Color Department, with the apparent intent to add these employees to and make them part of the existing unit in the Printing Department.

The Employer contends that the unit petitioned for was carved out to conform to the extent of Petitioner's organization, that a two-department unit would be unprecedented in the industry, that the Petitioner has no experience in representing unskilled employees and that the complete integration of its production process requires establishment of a production and maintenance unit embracing all departments of the Printing Division. The Intervenor generally supports the Employer's position and argues that only a production and maintenance unit, which the Regional Director found appropriate in an earlier proceeding, would be appropriate in this instance. The Petitioner contends that the Print Room and

the Color Shop are so interdependent and functionally integrated that it would be appropriate to have them represented in a single unit.

The Printing Department, or Print Room, is contiguous to the Color Department, but the two departments are separated by a wall. The Color Shop furnishes the colors or dyes which the Print Room uses in the printed application of color in printed patterns. All classifications sought by the Petitioner are found in either the Print Room or the Color Shop. Print Room classifications include, in addition to the currently represented machine printers and their apprentices, back tenders, gray tenders, swing inspectors, roller inspectors, jackmen, and plant clerical employees. Color Shop employees are color mixers, kettlemen, spare color men, tub washers, back gray washer operators, patch men, strike off machine operators, and plant clerical employees. Except for the plant clericals there appears to be no classification common to both departments. The Print Room employees sought here work alongside and in close connection with the skilled employees in the Printing Department who are presently under contract. There is no history of collective bargaining on behalf of the employees sought in the petition. In the past they have voted in a production and maintenance unit.[2] Departmental seniority is generally observed in personnel actions although certain job categories in the Print Room have special seniority arrangements. Employees of the Color Shop and unskilled employees of the Print Room interchange, to a degree, with employees of other departments of the Employer's printing division. Color Shop employees have their own lunchroom and time clock.

2. Case 11-RC-2271, not published in NLRB volumes.

There is a general manager in overall control of the Employer's production and finishing operations. Under him are superintendents of printing and finishing. The superintendent of printing controls separate departments of Engraving, Printing (or Print Room) Color (or Color Shop), Age and Soap, and Screen Printing, each department in turn having its own separate supervision. The Print Room and Color Shop each has a department head assisted by a hierarchy of subordinate supervisors. The supervisory staffs of the Print Room and Color Shop departments have no responsibility for the supervision or direction of each other's employees. The terms and conditions of employment of employees of the Print Room and the Color Shop are essentially similar to those of all other employees in the printing division and furnish no ground for separate representation. Thus, they enjoy the same vacations, pension plan, pay methods, shift hours, and employee benefits provided for all production and maintenance employees. Although the Color Shop may be said to be an essential adjunct to the Print Room, there are other departments, such as the Age and Soap, which can be said to have a close relationship to the Print Room. Moreover, the record shows that there are other Color Shop employees performing the same function for the Screen Printing Department, and since their functions, duties, and responsibilities are essentially similar to these Color Shop employees sought here, there is little justification for a unit including only those Color Shop employees who serve the Print Room.

The Petitioner does not contend that the two-department unit sought is a homogeneous craft unit, and on the record we find that it is not. Instead, the Petitioner seeks the multi-departmental unit which, it contended, it could show to be appropriate. No case has been cited by the Petitioner in support of such contention and Petitioner has

pointed to no bargaining history on such basis either in other plants of the Employer or in the industry generally. On the contrary, witnesses long familiar with the industry testified that they know of no instance where such a unit of Print Room and Color Shop employees exists. The possibility that technical advances in textile printing may in time erase the Petitioner's traditional constituency furnishes no proper basis for finding appropriate a unit which, by established standards, is inappropriate. The Board's general policy is not to grant multi-departmental units. In view of the foregoing, we find that a unit of Color Shop and unrepresented Print Room employees is inappropriate.

Although the Petitioner did not request the establishment of a single departmental unit including the machine printers and unrepresented Print Room employees, such departmental unit would be appropriate if the Petitioner is willing to represent such unit and the unrepresented Print Room employees choose to become part of such unit. The standards applied by the Board in the *Mallinckrodt* case[3] do not necessarily militate against the establishment of a separate departmental unit.[4] It is true that the absence of a bargaining history alone is not decisive.[5] But, unlike the *Timber Products* case, and other similar cases, the Print Room is not so integrated with the rest of the Employer's operations as to suggest that a separate unit of Print Room employees would be so unstabilizing as to justify denial of separate representation. Moreover, it appears that the Engraving Department and the machine printers are already separately represented,[6]

3. *Mallinckrodt Chemical Works*, 162 NLRB 387.
4. *E. I. Dupont de Nemours & Co.*, 162 NLRB 413, 418-419.
5. *Timber Products Company*, 164 NLRB No. 109.
6. *E. I. Dupont de Nemours & Co., supra.*

and what is perhaps of greater relevancy is that machine printing apprentices are selected from among the back tenders and gray tenders who work closely with the machine printers in the Print Room, and, for all that appears, there may be a natural progression from other classifications in the Print Room to back tenders and gray tenders positions and on to acknowledged craft status of the machine printers and apprentices.

The unrepresented employees of the Print Room and the existing craft group of machine printers work under common supervision separate from that of all other employees. There is no substantial interchange on a continuing basis between Print Room employees and employees of other departments. The machine printers and unrepresented Print Room employees work in close contact and thus have a community of interest not shared with other production workers, and they comprise a separate functional and departmental group of employees. The Board has found such departmental grouping to be appropriate for bargaining.[7] In such circumstances, we shall direct a self-determination election among the employees of the Print Room sought by the Petitioner.[8]

In view of the foregoing, and upon the entire record, we shall direct a self-determination election among the following voting group of employees:

All employees of the Printing Department, or Print Room, of the Employer's plant at Lyman, South Caro-

7. *Lyman Printing and Finishing Company*, Case 11-RC-2523, 1967, not reported in the Board's printed volumes. See *General Motors Corporation, Chevrolet Forge Plant*, 114 NLRB 234; see also *Kimball Systems, Inc.*, 164 NLRB No. 33, footnote 8.

8. Inasmuch as the interest of the Petitioner is not clear from the record before us we instruct the Regional Director not to proceed with the election directed herein until he shall have first determined that the Petitioner has made an adequate showing of interest among the employees in the unit found to be appropriate.

lina, excluding journeymen and apprentice machine printers, office clerical employees, professional and technical employees, all other employees, guards and supervisors as defined in the Act.

If a majority of the employees in the voting group above cast their ballots for the Petitioner, they will be taken to have indicated their desire to be included in the existing unit of journeymen and apprentice machine printers currently represented by the Petitioner, the Regional Director conducting the election directed herein is instructed to issue a certification of results of election, and the Petitioner may bargain for such employees as part of that unit. If a majority of them vote against the Petitioner, they will be taken to have indicated their desire to remain unrepresented and the Regional Director will issue a certification of results to that effect.

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 11 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the

designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[9] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Machine Printers and Engravers Association of the United States.

Dated, Washington, D. C., July 14, 1969.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

9. In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 89 S.Ct. 1426 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days of the date of this Decision and Direction of Election. The list may initially be used by the Regional Director to assist in determining an adequate showing of interest. The Regional Director shall make the list available to all parties to the election when he shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

TRIAL EXAMINER'S DECISION

(Issued April 13, 1970)

Statement of the Case

The Issue

The case arises on a Motion of Counsel for the General Counsel for Summary Judgment, based upon an admitted refusal by the Respondent to bargain with the certified charging Union on the ground that the unit found appropriate by the Board is inappropriate and "contrary to the statutes, Board precedents, and industry practice." Therefore, the Respondent contends, the Union was not properly certified as the collective-bargaining representative.

The Representation Proceeding[1]

Upon petition filed on October 30, 1968, under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159 (c)) by Machine Printers and Engravers Association of the United States, herein called the Union, a hearing involving the representation of employees of Lyman Printing and Finishing Company, A Division of M. Lowenstein & Sons, herein called the Respondent, was held before a Hearing Officer of the Board on November 21, 22 and 27, 1968. Thereafter, on December 3, 1968, the Hearing Officer issued his Report on such hearing, and on December 12, 1968, the Regional Director of Region 11 of the Board issued an Order transferring the case to the Board.

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1. Administrative or official notice is taken of the record in the representation proceeding, Case No. 11-RC-2837, as the term "record" is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as amended). See *LTV Electrosystems, Inc.*, 166 NLRB 938, enf'd. 388 F. 2d 683 (C.A. 4, 1968), cert. den., 393 U.S. 843; *Golden Age Beverage Co.*, 167 NLRB No. 24, enf'd. 415 F. 2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Intertype Co.* v. *N.L.R.B.*, 401 F. 2d 41 (C.A. 4, 1968), cert. den., 393 U.S. 1049 (1969); *Follett Corp., et al.*, 164 NLRB 378, enf'd. 397 F. 2d 91 (C.A. 7, 1968); Section 9(d) of the National Labor Relations Act.

The Union then represented some employees of the Respondent in two separate bargaining units, one in the Respondent's Engraving Department on a departmental basis and the other a craft unit of machine printers in the Print Department or Print Room. It sought an election among the employees of the Respondent's Color Department and also among the unrepresented employees in the Print Room, with the apparent intent of adding such employees to the existing unit in the Print Room. The Respondent contended that such a unit was not appropriate for collective bargaining.

On July 14, 1969, the Board issued its Decision and Direction of Election in which, after discussing the evidence and the various contentions, it concluded that a departmental unit consisting of employees in the Print Room could be appropriate, if the unrepresented employees in the Print Room chose to become part of such a unit. The Board therefore directed that a self-determination election be held in a voting group consisting substantially of the unrepresented non-supervisory employees in the Print Room, provided that the Union was willing to represent such employees and made an adequate showing of interest therein.

The Board further said that if a majority of that group voted for the Union, the Regional Director would certify that result, and the Union could then bargain for them as a part of the Union's bargaining unit of Print Room employees. With respect to the employees in the Color Department sought by the Union, the Board found that they would not constitute an appropriate unit, either alone or as part of a unit of Print Room employees.

On August 4, 1969, Respondent filed its Motion for Reconsideration, Rehearing, and Stay of Scheduled Election, after which, on August 5, 1969, the Union filed its

Opposition to the Respondent's Motion. By telegraphic order dated August 11, 1969, the Board denied Respondent's Motion, stating that ". . . it contains nothing not previously considered by the Board. . . ."

On August 13, 1969, an election by secret ballot was conducted under the supervision and direction of the Regional Director in the stated voting group to determine the question of representation. Upon conclusion of the balloting the parties were furnished a Tally of Ballots which showed that of approximately 156 eligible voters, 112 cast ballots for the Union, 36 cast ballots against the Union and 1 ballot was challenged. The challenged ballot was not sufficient to effect the results of the election.

On August 20, 1969, Respondent filed timely objections to the election and to conduct affecting the results of the election, alleging, in substance, the following:

1. That employees were threatened and coerced by representatives or members of the Union in such a manner as to make a reasonable choice in the election impossible.

2. That by threatening employees before and after the election, conditions as required by the Board for such election were not possible.

3. The Board did not consider all evidence, improperly applied the law regarding the appropriateness of the unit, and thereby allowed an election to be held in an illegal unit.

In conclusion the Respondent respectfully requested that the objections be investigated and sustained, and that a hearing be held on the above allegations.

On September 18, 1969, the Regional Director issued a Supplemental Decision and Certification of Results of Election. In this Decision the Regional Director stated that

an investigation of the Respondent's objections had been conducted, during which all parties were afforded opportunity to submit and present evidence bearing on the issues. After discussion of the evidence, the Regional Director concluded in his Decision that the Respondent had raised no substantial or material issues of fact or law which would warrant setting aside the election. Consequently, the Regional Director overruled the Respondent's objections in their entirety and certified that the Union may bargain for the employees in the voting unit as part of the group of employees which the Union currently represented.

Thereafter on October 13, 1969, the Respondent timely filed with the Board in Washington, D.C., its Request for Review of the Regional Director's Supplemental Decision and Certification of Results of Election, in which Respondent requested that the election be set aside. On October 20, 1969, the Union filed its opposition to Respondent's Request for Review.

On November 4, 1969, the Board by telegraphic order denied the Respondent's Request for Review for the reason that ". . . it raises no substantial issues warranting review. . . ."

The Unfair Labor Practice Case

On November 19, 1969, the Union filed the instant unfair labor practice charge alleging that since the certification the Respondent had refused and continues to refuse to bargain with the Union.

On December 23, 1969, the Regional Director issued a Complaint and Notice of Hearing alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to meet and negotiate with the Union as

the bargaining representative of the employees in the certified unit, though requested to do so since the certification.

On January 8, 1970, the Respondent filed its Answer to the Complaint in which it admitted certain allegations of the complaint and denied others. The Respondent admitted that the Union requested, and the Respondent refused, to meet and negotiate on behalf of the involved employees. In defense the Respondent asserted that the election unit was not appropriate and that its objections to the election had been improperly overruled. Consequently, the Respondent denied the commission of unfair labor practices, and requested a hearing before a Trial Examiner.

On January 26, 1970, Counsel for the General Counsel filed a Motion for Summary Judgment, stating as grounds therefore that under the applicable Rules and Regulations and Decisions by the Board, the pleadings and attached exhibits detailing the facts heretofore described establish that the General Counsel is entitled to judgment as a matter of law. On January 26, 1970, I issued an Order to Show Cause on the General Counsel's Motion, returnable February 9, 1970, subsequently extended at the request of the Respondent to February 23, 1970. Under date of February 20, 1970, Respondent filed its Response to the Order to Show Cause accompanied by (1) Application for Subpoenas Duces Tecum, (2) Application to Take Depositions, and (3) Motion to be Granted Leave to Require Certain Persons to Answer Interrogatories. On the same date Counsel for the General Counsel filed a Response and Memorandum Brief. No other responses have been received.

On February 26, 1970, counsel for the General Counsel filed an Opposition to the Respondent's Applications and Motion, and on the same day I issued a telegraphic order denying the Respondent's requests. In accordance with

the terms of the order, written opinion explaining the basis of the order is attached hereto as Appendix A.

Ruling on Motion for Summary Judgment

Counsel for the General Counsel contends that all issues in dispute were decided by the Board in the representation case and that he is therefore entitled to summary judgment as a matter of law.

The Respondent opposes summary judgment on statutory and constitutional grounds and asserts that due process requires that a full hearing be held on all issues, including the issues raised in the representation proceeding. In addition the Respondent requests that before any judgment is rendered on the motion for summary judgment that it be permitted to develop all material issues through discovery procedures, including the production by Board members and the Regional Director, pursuant to subpoenas *duces tecum,* of certain documentary material in the Board's files, and further by the use of interrogatories and depositions, directed, *inter alia,* to Board members and the Regional Director. It is in connection with the latter request that the Respondent filed the applications and motion for subpoenas, depositions and interrogatories referred to above and which are disposed of in Appendix A.

The basic position of the Respondent is that the Board's unit determination was incorrect in the representation case and, additionally, that a hearing should have been held on its objections to the election. These were issues which were considered and decided by the Board in the representation proceeding.

It is established Board policy, in absence of newly discovered or previously unavailable evidence or special circumstances, not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or

could have been litigated in a prior related representation proceeding.[2] This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are raised.[3] Respondent does not claim to present any newly discovered or previously unavailable evidence. No special circumstances are apparent.

Ordinarily this would dispose of the matter. However, the Respondent has raised several contentions which require disposition.

Constitutionality of the Board's Procedures

The Respondent's first contention, as stated in its response to the Order to Show Cause, is that the Board's summary judgment procedure and Board rule 102.67(f) are unconstitutional. Rule 102.67(f) forbids relitigation in any related subsequent unfair labor practice proceeding of any issue which was or could have been raised in the representation proceeding. I cannot sustain this contention of the Respondent.

In the first place, I do not believe it appropriate for me, as a trial examiner of the Board, to declare procedures and rules established by the Board to be unconstitutional.

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2. *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enf'd. 379 F. 2d 517 (C.A. 7, 1967), cert. den., 389 U.S. 1041. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); NLRB Rules and Regulations, Sections 102.67(f) and 102.69(c).

3. *O.K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd. 297 F. 2d 74 (C.A. 5, 1961). See *N.L.R.B.* v. *Air Control Products, Inc.*, 335 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B.* v. *Bata Shoe Co.*, 377 F. 2d 821, 826 (C.A. 4, 1967), cert. den., 389 U.S. 917: ". . . there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to determination of whether NLRB election results are to be accepted for purposes of certification."

I must assume the constitutionality of the Board's summary judgment procedures and of Rule 102.67(f).[4]

No court has held the Board's summary judgment procedures or rule 102.67(f) to be unconstitutional. Indeed, Board Orders based on summary judgments have been enforced by most of the U.S. Courts of Appeals.[5] I am cited

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4. In the case of *Rite-Form Corset Company, Inc.*, 75 NLRB 174, 176, where the contention was made to the Board that a portion of the National Labor Relations Act was unconstitutional, the Board said:

> "As an administrative agency of the Federal Government, it is inappropriate for the Board to pass upon questions regarding the constitutionality of Congressional enactments. Such questions will be left to the courts. In the absence of any court decision to the contrary, the Board assumes that the Act as amended does not violate any provision of the Constitution of the United States, as alleged by the petitioner."

The Trial Examiner must accord similar recognition to the Board's rules and decisions.

5. See, for example, the following cases, all decided within the last 4 years: *N.L.R.B.* v. *Rexall Chemical Co.*, 370 F. 2d 363 (C.A. 1, 1967); *Baumritter Corp.* v. *N.L.R.B.*, 386 F. 2d 117 (C.A. 1, 1967); *N.L.R.B.* v. *Union Carbide Caribe, Inc.*, F. 2d (C.A. 1, 1970), 73 LRRM 2774; *Polymers, Inc.* v. *N.L.R.B.*, 414 F. 2d 999 (C.A. 2, 1969), cert. den., January 12, 1970, 73 LRRM 2121; *N.L.R.B.* v. *Olson Bodies, Inc.*, F. 2d (C.A. 2, 1970), 73 LRRM 2202; *N.L.R.B.* v. *Puritan Sportswear Corp.*, 385 F. 2d 142 (C.A. 3, 1967); *N.L.R.B.* v. *Certified Testing Laboratories, Inc.*, 387 F. 2d 275 (C.A. 3, 1967); *N.L.R.B.* v. *New Enterprise Stone & Lime Co.*, 413 F. 2d 117 (C.A. 3, 1969); *N.L.R.B.* v. *Carolina Natural Gas Corp.*, 386 F. 2d 571 (C.A. 4, 1967); *LTV Electrosystems, Inc.* v. *N.L.R.B.*, 388 F. 2d 683 (C.A. 4, 1968); *N.L.R.B.* v. *Aerovox Corp.*, 390 F. 2d 653 (C.A. 4, 1968); *N.L.R.B.* v. *Rish Equipment Co.*, 401 F. 2d 597 (C.A. 4, 1968); *N.L.R.B.* v. *Union Brothers*, 403 F. 2d 883 (C.A. 4, 1968); *N.L.R.B.* v. *Aerovox Corp.*, 409 F. 2d 1004 (C.A. 4, 1969); *N.L.R.B.* v. *Hevi-Duty Electric Co.*, 410 F. 2d 757 (C.A. 4, 1969); *N.L.R.B.* v. *Newport Mining Corp.*, 417 F. 2d 625 (C.A. 4, 1969); *Neuhoff Bros. Packers, Inc.* v. *N.L.R.B.*, 362 F. 2d 611 (C.A. 5, 1966), cert. den., 386 U.S. 1027; *Southwestern Portland Cement Co.* v. *N.L.R.B.*, 407 F. 2d 131 (C.A. 5, 1969), cert. den., 396 U.S. 820; *N.L.R.B.* v. *Capitan Drilling Co.*, 408 F. 2d 676 (C.A. 5, 1969); *Riverside Press, Inc.* v. *N.L.R.B.*, 415 F. 2d 281 (C.A. 5, 1969), cert. den., February 24, 1970, 73 LRRM 2537; *N.L.R.B.* v. *Golden Age Beverage Co.*, 415 F. 2d 26 (C.A. 5, 1969); *N.L.R.B.* v. *Crest Leather Mfg. Corp.*, 414 F. 2d 421 (C.A. 5, 1969); *Pepperell Mfg. Co.* v. *N.L.R.B.*, 403 F. 2d 520 (C.A. 5, 1968), cert. den., 395 U.S. 922 (1969); *N.L.R.B.* v. *Singleton Packing Co.*, 418 F. 2d 275 (C.A. 5, 1969); *Frito-Lay, Inc.* v. *N.L.R.B.*,

to no case in which a court has refused enforcement of a Board order on the ground that the Board may not use summary judgment procedure. On the contrary, whenever the issue has been raised the courts have uniformly upheld the Board's procedure.[6]

On this state of authority, it must be found that the Board is authorized to utilize summary judgment procedure in cases where there are no substantial or material

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F. 2d (C.A. 5, 1970), 73 LRRM 2565; *Amax Aluminum Extrusion Products, Inc.* v. *N.L.R.B.*, F. 2d (C.A. 5, 1970), 73 LRRM 2780; *N.L.R.B.* v. *Tennessee Packers, Inc.*, 379 F. 2d 172 (C.A. 6, 1967), cert. den., 389 U.S. 958; *N.L.R.B.* v. *Brush-Moore Newspapers, Inc.*, 413 F. 2d 809 (C.A. 6, 1969), cert. den., January 12, 1970, 73 LRRM 2120; *N.L.R.B.* v. *Dean Foods, Inc.*, F. 2d (C.A. 6, 1970), 73 LRRM 2320; *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F. 2d 199 (C.A. 7, 1966); *Macomb Pottery Co.* v. *N.L.R.B.*, 376 F. 2d 450 (C.A. 7, 1967); *N.L.R.B.* v. *Krieger-Ragsdale & Company, Inc.*, 379 F. 2d 517 (C.A. 7, 1967), cert. den., 389 U.S. 1041; *Follett Corp.* v. *N.L.R.B.*, 397 F. 2d 91 (C.A. 7, 1968); *N.L.R.B.* v. *Hollywood Brands, Inc.*, 398 F. 2d 294 (C.A. 7, 1968); *N.L.R.B.* v. *Montgomery Ward & Co.*, 399 F. 2d 409 (C.A. 7, 1968); *N.L.R.B.* v. *Red Bird Foods, Inc.*, 399 F. 2d 600 (C.A. 7, 1968); *State Farm Mutual Automobile Insurance Co.* v. *N.L.R.B.*, 411 F. 2d 356 (C.A. 7, 1969), cert. den., 396 U.S. 832; *State Farm Mutual Automobile Insurance Co.* v. *N.L.R.B.*, 413 F. 2d 947 (C.A. 7, 1969), cert. den., 396 U.S. 958; *N.L.R.B.* v. *Wacho Mfg. Co.*, F. 2d (C.A. 7, 1970), 73 LRRM 2560; *N.L.R.B.* v. *Aircraft Engineering Corp. (Selb Mfg. Co.)*, 419 F. 2d 1303 (C.A. 8, 1970); *N.L.R.B.* v. *E-Z Davies Chevrolet, et al.*, 395 F. 2d 191 (C.A. 9, 1968); *N.L.R.B.* v. *Continental Nut Company*, 395 F. 2d 830 (C.A. 9, 1968); *N.L.R.B.* v. *Red-More Corp.*, 418 F. 2d 890 (C.A. 9, 1969); *Cap Santa Vue, Inc.* v. *N.L.R.B.*, F. 2d (C.A.D.C. January 20, 1970), 73 LRRM 2224; *Campbell, et al., d/b/a Valley Manor Convalescent Center* v. *N.L.R.B.*, F. 2d (C.A.D.C. January 20, 1970), 73 LRRM 2224; *N.L.R.B.* v. *Mar Salle, Inc.*, F. 2d (C.A.D.C. 1970), 73 LRRM 2517; *Clothing Workers (Winfield Mfg. Co.)* v. *N.L.R.B.*, F. 2d (C.A.D.C. 1970), 73 LRRM 2323.

6. See, for example, the following cases cited in footnotes 5 or 7: *Union Carbide Caribe, Inc.; Baumritter Corp.; Certified Testing Laboratories, Inc.; Puritan Sportswear Corp.; Carolina Natural Gas Corp.; LTV Electrosystems, Inc.; Aerovox Corp.;* (both cases); *Union Brothers; Clement-Blythe Companies; Capitan Drilling Co.; Crest Leather Mfg. Corp.; Frito Lay, Inc.; Clothing Workers (Winfield Mfg. Co.); Brush-Moore Newspapers, Inc., E-Z Davies Chevrolet, et al.; Red-More Corp.; Mar Salle, Inc.; Follet Corp.*

issues requiring an evidential hearing. It has been further held that Board rule 102.67(f) is reasonable. In the case of *N.L.R.B.* v. *Mar Salle*, 173 NLRB No. 69, 73 LRRM 2517 @ 2521, the Court of Appeals for the District of Columbia said of the rule:

> "This Board rule against relitigation of issues . . . is eminently reasonable. . . . It was therefore not a denial of due process to refuse to hold a hearing in the unfair labor practice proceedings absent a showing of new or previously unavailable evidence."

In several other summary judgment cases the courts, while refusing enforcement of Board orders (generally on the ground that, in the Court's view, objections to the election raised substantial and material issues requiring hearing), specifically upheld or assumed the authority of the Board to issue summary judgments.[7]

The Determinations in the Representation Case

In its response to the Order to Show Cause the Respondent attacks the Board decision in the representation case as arbitrary and capricious. Thus, the Respondent asserts that the Board ignored or refused to accept certain testimony by company executives and departed from recognized precedent in determining the appropriate unit, and further that the Decision and Direction of Election contained numerous discrepancies, inconsistencies, and distortions of the record. This action of the Board, the Respondent says, is of so serious a nature as to raise material issues of genuine fact, namely, "has the Board's conduct in this case been arbitrary and capricious?". (Response to Order to Show Cause, page 12), and "Why was such testimony ignored?" (Response to Order to Show Cause, page 14).

7. See, for example, *N.L.R.B.* v. *Chelsea Clock Co.*, 411 F. 2d 189 (C.A. 1, 1969); *N.L.R.B.* v. *Ortronix Inc.*, 380 F. 2d 737 (C.A. 5, 1967); *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F. 2d 78 (C.A. 4, 1969); *National Cash Register Co.* v. *N.L.R.B.*, 415 F. 2d 1012 (C.A. 5, 1969).

In support of this position the Respondent has summarized and analyzed certain of the Board's findings and evidence in the representation record. In addition the Respondent filed the applications for subpoenas, depositions and interrogatories referred to previously.

The Respondent has made no offer of any specific new evidence to be added to the representation record. Its essential position is that record was not properly evaluated by the Board. This is not a contention which I am free to consider. The Board has made a disposition of the representation issues, which is final at this stage of the proceeding. Under existing authority such disposition may be re-examined only by the Board or by a court of appeals in an action to enforce or review a Board order under Section 10 of the Act. I therefore respectfully refer the Respondent to that procedure.

Other contentions of the Respondent raised in its response to the order to show cause, none of which are found to be sustained, are disposed of in the opinion attached as Appendix A.

It is found that all material outstanding issues raised by the pleadings have been resolved by the Board. It is further found that the Respondent has not established the existence of any controverted matter cognizable by the Trial Examiner and requiring an evidential hearing. On such a state of the record the Motion for Summary Judgment is in order and is granted.

Upon the basis of the record before me I make the following further:

Findings and Conclusions

I. The business of the Respondent

Respondent is a New York corporation engaged in the manufacture, printing and finishing of textile fabrics at a plant in Lyman, South Carolina.

During the past 12 months, which period is representative of all times material herein, Respondent received raw materials valued in excess of $50,000 at its Lyman, South Carolina, plant directly from points outside the State of South Carolina. During the same period of time, Respondent manufactured, sold and shipped finished products valued in excess of $50,000 directly to points outside the State of South Carolina.

Respondent is an employer in commerce within the meaning of the Act.[8]

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Regional Director, on behalf of the Board, having certified on September 16, 1969, that it appeared from the Tally of Ballots that the Union had been designated by Respondent's employees in the categories described below, and the Regional Director having further certified that the Union may bargain for the employees in such categories as part of the group of employees which the Union currently represents, it is now found that at all times since

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8. The findings in this paragraph are from the Board's Decision and Direction of Election. The findings in the 2 preceding paragraphs are from paragraphs 2 and 3 of the Complaint, which the Answer admits. However, the Answer denies allegations in paragraph 4 of the Complaint to the effect that the Respondent is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The basis for, or the significance of, the denial of paragraph 4 of the Complaint is not disclosed. The question is not discussed in the Respondent's Response to the Order to Show Cause on the Motion for Summary Judgment. This may suggest that the point is no longer pressed. In any event, the Board's determination concerning it is the law of the case at this juncture. Hence the finding.

September 18, 1969, by virtue of Section 9(a) of the Act, the Union has been the exclusive representative of all the employees in said categories with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

> All employees of the Printing Department, or Print Room, of the Employer's plant at Lyman, South Carolina, excluding journeymen and apprentice machine printers, office clerical employees, professional and technical employees, all other employees, guards and supervisors as defined in the Act.

Though requested by the Union on or about November 12, 1969, to negotiate a collective bargaining agreement for those employees the Respondent declines to recognize the Union as their collective bargaining representative, thereby refusing to bargain collectively in violation of Section 8(a)(5) of the Act, and interfering with, restraining and coercing employees in violation of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions, pursuant to Section 10(c) of the Act, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the duration of the certification, the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized

exclusive bargaining representative of the employees involved.[9]

B. Lyman Printing and Finishing Company, A Division of M. Lowenstein & Sons, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Machine Printers and Engravers Association of the United States as the exclusive collective-bargaining representative of the following employees:

> All employees of the Printing Department, or Print Room, of the Employer's plant at Lyman, South Carolina, excluding journeymen and apprentice machine printers, office clerical employees, professional and technical employees, all other employees, guards and supervisors as defined in the Act.

(b) Interfering with the efforts of the Union to negotiate for or represent employees as collective-bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with Machine Printers and Engravers Association of the United States as the exclusive representative of all employees in the categories described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

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9. The purpose of this provision is to insure that the employees will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co.*, 136 NLRB 785; *Commerce Co., d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F. 2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965).

(b) Post at its place of business in Lyman, South Carolina, copies of the notice attached hereto marked "Appendix B."[10] Copies of said notice, on forms provided by the Regional Director for Region 11, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by the Respondent for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 11, in writing, within 20 days from receipt of this recommended Order what steps the Respondent has taken to comply herewith.[11]

Dated at Washington, D. C., April 13, 1970.

/s/ Charles W. Schneider
Charles W. Schneider
Trial Examiner

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10. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

11. In the event these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 11, in writing, within 10 days from receipt of this Order what steps the Respondent has taken to comply herewith."

APPENDIX A

Opinion Revoking Subpoenas Duces Tecum and Denying Applications to Take Depositions and to Require Interrogatories

Along with its Response to the Order to Show Cause on the Motion for Summary Judgment, the Respondent has filed 3 documents, (1) Application for Subpoenas Duces Tecum, (2) Application to Take Depositions, and (3) Motion to Be Granted Leave to Require Certain Persons to Answer Written Interrogatories.

On February 26, 1967, Counsel for the General Counsel filed an Opposition to the Respondent's applications and motion, with an alternative request to revoke the subpoenas if issued. On the same day I issued a telegraphic order denying Respondent's applications and motion, and stating that a written opinion would be contained in the Trial Examiner's Decision disposing of the Motion for Summary Judgment.

The Subpoenas Duces Tecum

In its Response to the Order to Show Cause the Respondent frankly avows that the various requests involve discovery.

The subpoenas *duces tecum* requested are directed to Frank W. McCulloch, Gerald A. Brown, Sam Zagoria, and Reed Johnston. They require the production,

> 'for the Respondent's inspection and copying, any and all affidavits, memoranda, correspondence, investigation reports or other documents used by the above-named persons during the related representation proceedings in this case."

Since the issuance of subpoenas is mandatory under Section 11 of the National Labor Relations Act, subject to rev-

ocation thereafter, the subpoenas are to be deemed issued, and the question is whether they should be revoked.

Frank W. McCulloch is the Chairman of the National Labor Relations Board, and Gerald A. Brown a member of the Board. Sam Zagoria is a former member of the Board whose term expired on December 16, 1969. Reed Johnston is the Board's Regional Director for Region 11. The Three Board members constituted the panel which issued the Decision and Direction of Election of July 14, 1969. The Regional Director issued the Supplemental Decision and Certification of Results of Election dated September 18, 1969. The ground stated by the Respondent for the application is that,

> "Such subpoenas are necessary in order to assure to the Respondent its constitutional right to demonstrate and develop any and all genuine issues of material fact which will necessitate a denial of General Counsel's Motion for Summary Judgment and the granting of a full hearing on whether the Respondent has violated the Act as charged."

Assuming its existence, the material described constitutes part of the Board's official records, and is not automatically securable unless it is part of the representation case record (see fn. 1, above), or matter available for public inspection under the provisions of the Administrative Procedure Act. Neither exception is applicable here.

Section 102.118 of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as amended) *inter alia*, prohibits Board personnel, including Board members and regional directors, from producing any records of the Board.

> "whether in answer to a subpoena, subpoena *duces tecum*, or otherwise, without the written consent of the Board or the chairman of the Board if the official

> or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel."

No showing is made that the Respondent has requested the General Counsel or the Chairman of the Board for consent to the production of the material. Absence of such a request is sufficient ground for denying compulsory production of matter of this character, for upon proper showing consent may be given. *Touhey* v. *Ragen,* 340 U.S. 462 (1951); *N.L.R.B.* v. *Jamestown Sterling Corp.,* 211 F.2d 725 (C.A. 2, 1954); *Davis* v. *Braswell,* 363 F.2d 600 (C.A. 5, 1966); *Harvey Aluminum (Inc.), et al.* v. *N.L.R.B.,* 335 F. 2d 749 (C.A. 9, 1964); *North American Rockwell Corp.* v. *N.L.R.B.,* 389 F. 2d 866 (C.A. 10, 1968).

In addition, the Respondent has not demonstrated the materiality or essentiality of the material sought. The statement in the application that the subpoenas are necessary to develop any material factual issues requiring the denial of the motion for summary judgment and the granting of a hearing, is too general in nature to warrant compulsory production of the documents. Treating the subpoenas as issued, they are now revoked. *Follett Corp., et al.,* 164 NLRB 378.

In any event, material of this character is "confidential and privileged against disclosure," unless a hearing is shown to be required. The burden is on the Respondent to make such a showing, and not having done so, the subpoenas are to be quashed. *Intertype Co.* v. *N.L.R.B.,* 401 F. 2d 41, 45 (C.A. 4, 1968), cert. den., 393 U.S. 1049 (1969). See also *N.L.R.B.* v. *Truck Drivers Local 282,* 70 LRRM 2793 (C.A. 2, 1969, Order on Motion). The discovery considerations advanced by the Respondent are discussed *infra.*

The Application to Take Depositions and the Motion to Require Interrogatories

In the Application for Depositions the Respondent requests the depositions of Board members McCulloch, Brown and Zagoria, and of the Respondent's General Manager, J. F. Magarahan. The interrogatories are directed to the same Board Members and to the Regional Director.

The basis asserted for requesting the depositions of the Board members is that,

> "It is expected that [they] would testify as to the reasons that they arbitrarily and capriciously ignored certain facts in the record and substantially departed from established Board precedent by their finding that a single-department unit of printing department employees is appropriate."

With respect to the deposition of Mr. Magarahan the application avers that,

> "It is expected that this witness would testify as to the instances in which the Board Panel ignored and/or distorted his testimony in reaching the above-mentioned Decision and Direction of Election."

The basis asserted for the interrogatories is

> ". . ..so that the Respondent may be allowed to exercise its constitutional right to discover and develop any and all genuine issues of material fact which will necessitate a denial of the General Counsel's Motion for Summary Judgment and the granting of a full trial on the issue of whether the Respondent has violated the Act as charged."

The request for depositions and interrogatories must be denied.

(1) Section 102.118 of the Board's rules, *inter alia*, prohibits a Board member or a regional director from testi-

fying in any proceeding with respect to "any information, facts, or other matter coming to his knowledge in his official capacity . . . without the written consent of the Board or the chairman of the Board. . . ." I consider this provision of the rule to be applicable to depositions and interrogatories. Here again the Respondent makes no showing that it has requested consent for the Board officials to testify. As with demands for the production of Board records, a request for and a denial of consent is a prerequisite to consideration of the substantive merit of the application for depositions and interrogatories. The failure to make such request thus requires denial of the application in this respect.

(2) Furthermore, the depositions and interrogatories are unnecessary for the establishment of the Respondent's purpose—if the purpose be assumed to have merit. For if, as the Respondent says, the Board "arbitrarily and capriciously ignored certain facts in the record" or "departed from established Board precedent," the Board's Decision and the record will demonstrate it.

(3) In addition, it is apparent from its statements of purpose that what the Respondent proposes with respect to the depositions and interrogatories directed to the Board officials is, at least in part, to cross-examine them in order to probe the mental processes by which they reached their conclusions. This the Respondent may not do. What the Supreme Court said in the *Morgan* cases concerning adjudicative action by the Secretary of Agriculture in that proceeding is applicable to the Board officials here: ". . . it is not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." (*Morgan* v. *U.S.*, 304 U.S. 1, 18 (1938)). In a later opinion, involving another phase of the case, the Supreme Court specifically

held that it was improper for the district court to authorize the taking of the deposition of the Secretary concerning the manner in which he reached his conclusions in the case. The Court said that, ". . . the short of the business is that the Secretary should never have been subjected to this examination. . . . Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." (*Morgan* v. *U.S.*, 313 U.S. 409, 422 (1941)). See also *Davis* v. *Braswell*, 363 F. 2d 600, 604 (C.A. 5, 1966), where the Court of Appeals, quoting the opinion in the 1941 *Morgan* case, ordered the quashing of a subpoena commanding a Regional Director of the Board to testify and to produce certain documents in a civil suit in a U.S. District Court, because, "The subpoena here attempts to examine the processes and reasoning of the Board and the General Counsel's office in reaching their conclusions prior to their official publication."

We turn now to the discovery considerations advanced by the Respondent.

Discovery

I.

It will be well at the outset to define the precise question presented, which is the right to discovery in NLRB proceedings before the Board, not the right to discovery in NLRB cases before the Courts. For discovery may be applicable in judicial situations involving the NLRB which are subject to the discovery provisions of the Federal Rules of Civil Procedure, as distinguished from proceedings before the Board—which are administrative in nature. Among these judicial proceedings are contempt actions involving alleged disobedience of Court decrees involving Board orders (see, for example, *Olson Rug Co.* v. *N.L.R.B.*,

291 F. 2d 655 (C.A. 7, 1961); *N.L.R.B.* v. *Schill Steel Products, Inc.*, 408 F. 2d 803 (C.A. 5, 1969); *N.L.R.B.* v. *Truck Drivers Local 282*, 70 LRRM 2793 (C.A. 2, order on motion 2/18/69); cf. *Schauffler* v. *Local 1291 ILA*, 189 F. Supp. 737 (1960)), and injunctive proceedings (see, for example, *Sperandeo* v. *Milk Drivers Local 537*, 334 F. 2d 381 (C.A. 10, 1964); *Fusco* v. *Kaase*, 205 F. Supp. 459 (D.C.N.D. Ohio, 1962); *Meter* v. *Minnesota Mining Co.*, 273 F. Supp. 659 (D.C. Minn. 1967)). Those cases are therefore not authority on the issue here.

For almost 2 decades the Board has consistently held that the discovery provisions of the Federal Rules of Civil Procedure are not applicable to proceedings before the Board.[1]

This view has been sustained by various Courts of Appeal. Thus, in 1951, in the case of *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 751, in upholding a trial examiner's refusal of subpoenas for taking the depositions of complaining witnesses prior to hearing, the Court of Appeals for the Ninth Circuit said, "There is no provision in the [National Labor Relations] Act authorizing the use of the discovery procedure." The Ninth Circuit has also ruled that without such authorizing legislation, a Federal administrative agency may not establish discovery procedures. *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 335 F. 2d 255 (C.A. 9, 1964).

Similarly, other Courts of Appeal have held that the discovery provisions of the Federal Rules are not appli-

1. See, for example, *Del Webb Co.*, 95 NLRB 377; *Miami Coca-Cola Bottling Co.*, 108 NLRB 456 fn. 2; *Baltimore Steam Packet Co.*, 120 NLRB 1521-22; *Chambers Mfg. Co.*, 124 NLRB 721, 722; *Sealtest Southern Dairies*, 126 NLRB 1223, fn. 3; *Plumbers Local 100*, 128 NLRB 398-400; *Edwards Trucking Co.*, 129 NLRB 385, fn. 1; *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 495; *W. H. Sackett, d/b/a Sackett Transportation, et al.*, 169 NLRB No. 57.

cable to the National Labor Relations Act. See, for example *Texas Industries, Inc.* v. *N.L.R.B.*, 336 F. 2d 128, 134 (C.A. 5, 1964) (". . . Board rules do not permit general prehearing discovery of such statements [of witnesses] . . . . The validity of these rules on their face has been upheld. . . ."); *Movie Star, Inc.*, 361 F. 2d 346, 352 (C.A. 5, 1966) (contention that respondents were denied due process by refusal of pretrial discovery is "without merit"); *The Raser Tanning Co.* v. *N.L.R.B.*, 276 F. 2d 80, 83 (C.A. 6, 1960) ("Administrative hearings of the Labor Board are governed by the Administrative Procedure Act rather than the Federal Rules of Civil Procedure"); *N.L.R.B.* v. *Vapor Blast Mfg. Co.*, 287 F. 2d 402 (C.A. 7, 1961) (Section 10(b) of the Act ". . . does not require the Board to adopt the entire discovery procedure contemplated by the Federal Rules of Civil Procedure"). It has also been said that the Federal Rules are inapplicable to administrative proceedings.[2]

However, some of the Court decisions cited above, and several other Court decisions, suggest that the Board has authority to establish discovery procedures.[3] Indeed, the Fifth Circuit has held that Sections 102.30 and 102.35 of the Board's Rules authorize discovery through the use of pretrial depositions of the General Counsel's witnesses. *N.L.R.B.* v. *Safway Steel Scaffolds Co.*, 383 F. 2d 273 (1967); *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994

2. Montgomery, *Discovery in Federal Administrative Proceedings*, 16 Stanford L.R. 1035, fn. 11 (1935): "The Administrative Procedure Act does not provide for discovery, and the Federal Rules of Civil Procedure do not apply to administrative proceedings."

3. Among these decisions are *Storkline Corp.* v. *N.L.R.B.*, 330 F. 2d 14 (C.A. 5, 1964); *Texas Industries, Inc., supra; Winn-Dixie Stores, Inc.* v. *N.L.R.B.*, 413 F. 2d 1008 (C.A. 5, 1969); *Trojan Freight Lines, Inc.* v. *N.L.R.B.*, 356 F. 2d 947 (C.A. 6, 1966); *Vapor Blast Mfg. Co., supra; Electromec Design Co.* v. *N.L.R.B.*, 409 F. 2d 631 (C.A. 9, 1969); *North American Rockwell Corp.* v. *N.L.R.B.*, 389 F. 2d 866 (C.A. 10, 1968). Other cases to the same effect, cited by the Respondent, are discussed *infra*.

(1968). In those cases the Court found error, not prejudicial, in statements by a trial examiner and a regional director, respectively, made in the course of refusing to authorize pretrial depositions, to the effect that there was no provision for discovery in Board procedure.[4] In the relatively recent *Electromec Design* case, *supra*, the Ninth Circuit, citing the *Safway* decision and Board rule 102.30, stated that it was within the discretion of the Trial Examiner whether to permit depositions to be taken prior to hearing. The Court said that,

> "Since there is no specific provision in the National Labor Relations Act for discovery procedure, *N.L.R.B.* v. *Globe Wireless Ltd.*, 193 F. 2d 748, 751 (9 Cir. 1951), it is the responsibility of the Board to formulate its own rules as to when discovery is available to a party, *N.L.R.B.* v. *Vapor Blast Mfg. Co.*, 287 F. 2d 402, 407 (7 Cir. 1961)."

There is no apparent suggestion in the opinion to the effect that the *Electromec* decision represents a modification of the *Globe Wireless* and *Federal Maritime* cases.[5]

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4. The Board has held that its procedures make no provision for discovery depositions. *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296.

5. It has been recommended that discovery should be made applicable to Federal Administrative proceedings. In 1955 a task force of the Hoover Commission (Commission on Organization of the Executive Branch of the Government) made a recommendation to the effect that the Administrative Procedure Act be amended to permit discovery in conformance with the Federal rules. (Task Force Report on Legal Services and Procedure, March 1955, p. 197). In 1962 the Administrative Conference of the United States recommended that each agency adopt discovery rules "to the extent and in the manner appropriate for its proceedings." (Final Report, Administrative Conference, December 15, 1962, Recommendation No. 30). Five administrative agencies have enacted discovery rules, or rules permitting the taking of pretrial depositions for discovery purposes: the Federal Trade Commission (16 C.F.R. 3.33), the Federal Communications Commission (47 C.F.R. 1.315), the Federal Maritime Commission (46 C.F.R. 502)—the latter under statutory authority enacted following the *Anglo-Canadian* decision of the Ninth Circuit, 81 Stat. 544, 46 U.S.C. 826—Federal Aviation Agency (14 C.F.R. 13.53),

II.

The sum of the foregoing authorities appears to be the following: (1) the discovery provisions of the Federal Rules of Civil Procedure are not applicable to administrative proceedings before the Board; (2) the Board's rules do not permit discovery in the sense of the Federal Rules; (3) the Board's action in denying discovery is subject to review only to the extent due process is involved; (4) the Courts appear to be divided on the question as to whether the Board has established, or has authority to establish, discovery procedures.

We turn now to authorities cited by the Respondent in support of the proposition that it is entitled to discovery, "in order to give it the opportunity to raise and develop all material issues . . . for the purpose of developing and amplifying the record." (Response to Order to Show Cause p. 16). These authorities are Rule 56(c) of the Federal Rules of Civil Procedure and a number of Court decisions.

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and the Bureau of Land Management, Department of Interior (43 C.F.R. 1850.0). The Interstate Commerce Commission is considering adoption of discovery rules. (Consultant's Report, Administrative Conference of the United States, Committee on Compliance and Enforcement Proceedings, Discovery in Agency Adjudication, January 1970 (pp. 2, 24)). In California discovery is authorized by statute in State administrative proceedings. *California Government Code,* 11507. Though the Federal Rules of Civil Procedure authorize extensive discovery, the Federal Rules of Criminal Procedure do not. The *Jencks* Act (18 U.S.C. 3500) permits the securing of statements of government witnesses in criminal cases after they have testified, to the extent related to the witness' testimony. Section 16 of the Federal Rules of Criminal Procedure does not further authorize the discovery or inspection of statements by government witnesses or prospective government witnesses, or (with limited exception) authorize discovery or inspection of "reports, memoranda, or other internal government documents made by government agents in connection with investigation or prosecution of the case. . . ."

The above facts are noted as a matter of information only. I express no opinion on what the policy or law should be. I address myself only to ascertaining what they are.

With respect to Rule 56(c), the Respondent points out that the rule requires the issuance of a summary judgment "forthwith, if the pleadings, *depositions, answers to interrogatories*, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." (Emphasis supplied) The Respondent urges that it follows from this that depositions and interrogatories should be available in NLRB summary judgment procedure. In my view, Rule 56(c) neither requires nor authorizes the use of depositions and interrogatories in NLRB summary judgment proceedings for the purpose of securing discovery.

In the first place the Board's summary judgment procedure is not founded in the Federal Rules of Civil Procedure, but in the Board's rules and decisions. *Krieger-Ragsdale & Company, Inc.*, 159 NLRB 490, 495, enf'd 379 F. 2d 517 (C.A. 7, 1967), cert. den. 389 U.S. 1041 (1968).

In the second place, the portion of Rule 56(c) quoted above does not purport to prescribe the conditions under which depositions and answers to interrogatories may be secured. It is rather a direction to consider such material when it is in the record. See Moore's Federal Practice 56.02(b), and 1963 note of Advisory Committee on Rules of Civil Procedure referred to in Moore's 56.01(12) @ pp. 2020-21. I do not apprehend that the Board's practice is to the contrary. If depositions allowable under Section 102.30 or consented to under Section 102.118 of the Board's rules, or answers to interrogatories similarly secured, are in the record of a Board summary judgment proceeding, it is to be assumed that they will be considered by the Board. It is therefore concluded that Federal rule 56(c) does not provide authority for discovery in NLRB proceedings.

The decisions referred to by the Respondent as supporting its demand for discovery are the following:

N.L.R.B. v. *Southern Materials Co.*, 345 F. 2d 240, 244 (C.A. 4, 1965); *Firestone Synthetic Fibers Co.* v. *N.L.R.B.*, 374 F. 2d 211, 214 (C.A. 4, 1967); *American Boiler Manufacturers Association* v. *N.L.R.B.*, 366 F. 2d 815 (C.A. 8, 1966); *Frito Co.* v. *N.L.R.B.*, 330 F. 2d 458, 465 (C.A. 9, 1964); *Home Builders* v. *N.L.R.B.*, 352 F. 2d 745 (C.A. 9, 1965). I do not interpret those decisions as requiring the establishment of discovery procedures by the Board.

In the *Southern Materials* case the Court said the following:

> "The brief filed in behalf of the Board does not reveal the Board's position with respect of the refusal to allow pre-hearing discovery. In view of our disposal of the other questions, it becomes unnecessary that we pass upon this issue except to observe that the Board, acting in a quasi judicial capacity as it does, should freely permit discovery procedure in order that the rights of all parties may be properly protected."

In the *Firestone* case, in rejecting an argument of the Board to the effect that the burden was on the respondent there to call other employee witnesses to corroborate the Respondent's version of a disputed conversation, the Court said (p. 214):

> "We think otherwise. Firestone had attempted unsuccessfully to use discovery procedures, including interrogatories, to learn the names of Board witnesses. If the Labor Board may sometimes have sufficient reasons for delimiting discovery in order to protect employees from company reprisal, it must accept the burden of producing more evidence than might otherwise be necessary. It is basically unfair for Labor Board counsel to argue to this court that the Company should have produced witnesses whose names were unknown to the Company because of a policy decision of the Board. See NLRB v. Southern Materials Co., 345 F. 2d 240, 244 (4th Cir. 1965)."

In addition, in connection with a finding of the Board as to an instance of alleged company threats in the *Firestone* case, which were not included in the complaint, the Court said (p. 215):

> "We said in NLRB v. Threads, Inc., 308 F. 2d 1, 9 (4th Cir. 1962), 'evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice.' Even so, we are reluctant to inject procedural technicalities into administrative proceedings. There would be less occasion for our doing so if trial examiners would permit, within protective limitations, reasonable discovery procedures."

The language of the *Southern Materials'* opinion appears to be advisory in character, rather than monitory—a conclusion which the language from *Firestone*, though somewhat more admonitional, seems to reinforce. The Court is, of course, the best authority as to how its opinions are to be construed, but I do not interpret them as holding that the Board must establish discovery in unfair labor practice proceedings before the Board.

Thus I note that in a 4th Circuit case subsequent to the *Southern Materials* and *Firestone* cases, in which the Court could have ruled that discovery is required, it did not do so. This is the case of *LTV Electrosystems* cited in footnote 1, *supra*. There the Board, reversing the Trial Examiner, denied the respondent's requests for inclusion in the record of material similar to that sought in the subpoenas here. The issue was presented to the Court on cross petitions for review and enforcement of the Board's order. See, for example, the Board's brief to the Court in the *LTV* case, page 2, note 2, and page 28, note 16, discussing the point. However, the Court's opinion does not refer to the issue.

It would thus appear that the *Southern Materials* and *Firestone Synthetic* cases are not to be construed as requir-

ing the Board to establish discovery. At most they would seem to indicate, contrary to the *Globe Wireless* and other cases, that the Board is authorized to establish discovery procedures and in the Court's opinion should do so. However, as we have seen, the Board has not done so, and with all respect to the Court, I am compelled to observe that I have no authority to do it for them.[6]

The other cases cited by the Respondent (*Frito, American Boiler* and *Home Builders*) are inapplicable and are not authority respecting discovery. *Frito* is the basic case, the other 2 cite *Frito* as authority in similar circumstances, and follow it.

Section 101.10 of the Board's rules, consistent with a similar provision in Section 10(b) of the NLRA, provides, in part, that in unfair labor practice hearings before the Board,

> "The rules of evidence applicable in the district courts of the United States under the rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling."

In *Frito* the 9th Circuit Court said in reference to that provision of the Board's rules:

> "The Federal Rules of Civil Procedure are not rules of evidence, but of procedure pursuant to which evidence may be taken. The provision noted must be taken to mean that the procedure to be followed in hearings before the Board shall be controlled as far as practicable by the Federal Rules of Civil Procedure."

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6. A trial examiner is required to follow the Board's precedents and policies until overruled by the Board or the Supreme Court (*Prudential Insurance Agents*, 119 NLRB 768; *Ranco, Inc.*, 109 NLRB 998; *Lenz Co.*, 153 NLRB 1399); even though there may be contrary authority in the Court of Appeals (*Iowa Beef Packers*, 144 NLRB 615; *Teamsters Local 390*, 119 NLRB 852; *Novak Logging Co.*, 119 NLRB 1573; *Scherrer Co.*, 119 NLRB 1587).

This language, however, had nothing to do with discovery. The issue to which the Court's statement was directed was whether the Board has authority to decide material unpleaded issues not sponsored by the General Counsel, where evidence on the matter was admitted without objection. In holding that the Board had such authority, the Court referred *inter alia*, to Rule 15(b) of the Federal Rules. That rule provides, in part, that, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings," and the complaint may be amended to conform to the evidence in such respect. In that connection the Court noted Section 101.10 of the Board's rules quoted above. With *Frito* as authority, the Respondent says that, there being no showing that discovery is clearly impracticable here, it should be permitted.

This contention, no doubt inadvertently, overlooks the fact that the Ninth Circuit is the Court which held that there is no provision in the National Labor Relations Act authorizing discovery. The language in the *Frito* opinion must be interpreted in that context. It seems clear to me that a holding that it is practicable for the National Labor Relations Board to follow a provision of the Federal rules authorizing findings on unpleaded but litigated issues, is not authority for the proposition that it is equally practicable to follow such rules in respect to discovery. To adopt the Respondent's view requires an assumption that the 9th Circuit in the *Frito* case was consciously overruling its prior decision in *Globe Wireless, Ltd. sub silencio.* I find nothing in the case to warrant such an assumption. Since the *American Boiler* and the *Home Builders* cases involve substantially the same issue as *Frito* I do not interpret them as constituting authority on the issue of discovery.

It thus appears that discovery is inapplicable in the instant situation and the Respondent's request therefor must consequently be denied.

III.

But even if it be assumed, for the purposes of discussion, that unfair labor practice proceedings before the NLRB are subject to the discovery provisions of Federal Rules of Civil Procedure it is by no means clear that the Respondent's requests should be granted. For, under Rule 26 of the Federal Rules deponents in discovery proceedings may not be examined regarding privileged matter. See also *N.L.R.B.* v. *Truck Drivers Local 282*, 70 LRRM 2793 (C.A. 2, 1969, order on motion).

In the light of the purpose of the Respondent's requests and the nature of the material and information sought, the matter seems clearly privileged under the principles of the *Intertype* and *Morgan* cases. While Federal rule 26(b) states, in sum, that testimony inadmissible at the trial may be secured if it appears "reasonably calculated to lead to the discovery of admissible evidence," it cannot be said that the testimony sought by the Respondent here is of such character.

In addition, rules 30 and 31 of the Federal Rules of Civil Procedure vest in the judge authority to order that depositions and interrogatories not be taken, or taken only under certain conditions, or that the scope of examination be limited as to subject matter.

In my view, in the light of the circumstances of the case, depositions and interrogatories should not be ordered to be taken, even if discovery is deemed applicable

Dated at Washington, D.C., April 13, 1970.

/s/ Charles W. Schneider
Charles W. Schneider
Trial Examiner

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively with MACHINE PRINTERS AND ENGRAVERS ASSOCIATION OF THE UNITED STATES as the exclusive collective-bargaining representative of all the following employees

All employees of the Printing Department, or Print Room, of our plant at Lyman, South Carolina, excluding journeymen and apprentice machine printers, office clerical employees, professional employees and technical employees, all other employees, guards and supervisors as defined in the Act.

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees as exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the categories listed above, and if an understanding is reached we will sign a contract with the Union.

Lyman Printing and Finishing Company, A Division of M. Lowenstein & Sons
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101. (Tel. No. 919-723-9211).

NATIONAL LABOR RELATIONS BOARD'S DECISION AND ORDER

(Dated June 24, 1970)

On April 13, 1970, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, granting General Counsel's Motion for Summary Judgment on the ground that there are no unresolved issues requiring an evidential hearing and finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended. The Trial Examiner recommended that the Respondent cease and desist from such unfair labor practices and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the Charging Party filed a reply brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.

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1. The Charging Party limited its response in its reply brief to a request for damages as a part of the remedy herein. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the said request.

2. The Trial Examiner attached to his Decision as Appendix A his Opinion Revoking Subpoenas Duces Tecum and Denying Applications to Take Depositions and to Require Interrogatories. One of the grounds for his action therein was that the Respondent has not requested the General Counsel or the Chairman of the Board for consent to the production of the material. The Respondent has since filed such a request with the Board. We hereby

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Lyman Printing and Finishing Company, A Division of M. Lowenstein & Sons, Lyman, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 24, 1970.

John H. Fanning, Member
Frank W. McCulloch, Member
Gerald A. Brown, Member
(Seal) National Labor Relations Board

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affirm the findings of the Trial Examiner in these matters, and deny the request of the Respondent, for the other reasons set forth in Appendix A of the Trial Examiner's Decision. *U. S.* v. *Morgan*, 313 U.S. 409, 422; *Davis* v. *Braswell*, 363 F.2d 660 (C.A. 5).

We have made an independent review of the Supplemental Decision and Certification of Results of Election in Case 11-RC-2837, and conclude that the Regional Director's rulings on the objections were correct. We do not adopt the finding that the Hearing Officer issued a Report on December 3, 1968.

OPINION OF COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,815

Lyman Printing and Finishing Company,
a Division of M. Lowenstein & Sons,
Petitioner,

versus

National Labor Relations Board,
Respondent.

No. 14,867

Machine Printers and Engravers
Association of the United States,
Petitioner,

versus

National Labor Relations Board,
Respondent.

On petition for review of an order of the
National Labor Relations Board.

(Argued March 4, 1971. Decided March 10, 1971.)

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges.

Robert T. Thompson and James J. Baldwin (J. Frank Ogletree, Jr., and Thompson, Ogletree, Haynsworth, and

Deakins on brief) for Petitioner in No. 14,815; and Warren Woods for Petitioner in No. 14,867; and Charles Robert Both, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Leonard M. Wagman, and Roger L. Sabo, Attorneys, National Labor Relations Board, on brief) for Respondent in Nos. 14,815 and 14,867.

PER CURIAM:

Having considered the briefs of the parties, the appendix filed by the petitioner Lyman Printing and Finishing Company, a Division of M. Lowenstein & Sons, and arguments of counsel, we conclude that the Board's order should be enforced.

Enforcement granted.

ORDER

(March 31, 1970)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,815

Lyman Printing and Finishing Company,
a Division of M. Lowenstein & Sons,
Petitioner,

versus

National Labor Relations Board,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD.

Upon motion of the appellant, Lyman Printing and Finishing Company, a Division of M. Lowenstein & Sons, by its counsel and for cause shown,

IT IS ORDERED THAT the mandate in the above-entitled case is stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court as prescribed by law

For the Court—by Direction
/s/ Samuel W. Phillips

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended [29 U.S.C. §151 *et seq.*], are as follows:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * *

"Sec. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of

the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The relevant provisions of the Administrative Procedure Act [5 U.S.C. §551 *et seq.*] are as follows:

Sec. 522 (a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decision;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing,

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in

any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as prec-

edent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Sec. 553 (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data,

views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

The relevant provisions of the Rules and Regulations of the National Labor Relations Board are as follows:

Sec. 102.30 *Examination of witnesses; depositions.*— Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address

of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the officer). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50. Such application shall be served on the regional director or the trial examiner, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve on the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served on all the other parties by the regional director or on all parties by the trial examiner.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath

by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the trial examiner, care of the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be.

(d) The trial examiner shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

Case No. 10-RC-7524

SWAINSBORO PRINTING & FINISHING CO.,
DIVISION OF TROY TEXTILES, INC.
Employer[1]

and

SOUTHEASTERN PRINTING SPECIALTIES AND PAPER PRODUCTS DISTRICT COUNCIL NO. S-7, SUBORDINATE TO INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION, AFL-CIO
Petitioner[2]

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Clyde R. Ray, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

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1. The name of the Employer appears as amended at the hearing.

2. The name of the Petitioner appears as amended at the hearing.

3. The Employer's witness testified as to certain department numbers and employee classification numbers used on the Employer's payroll; his recollection being refreshed by examination of a document of some nature. The Employer's counsel denied the request of the Petitioner's counsel to view the document, whereupon the Petitioner's counsel moved to strike the said testimony. The hearing officer failed to rule on the motion. As I have not relied upon such evidence in reaching the decision herein, I find that the Petitioner was not prejudiced. I also deem it unnecessary to rule on the motion at this time.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its power in connection with this case to the undersigned Regional Director.

Upon the entire record in this case[4], the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.[5]

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Employer is a printer and finisher of textiles, with a plant at Swainsboro, Georgia (the only plant involved in this proceeding). The Petitioner originally sought a unit of employees in the following classifications: kettle man, color mixer, color dipper, back tenders or grey tenders, tub and box washers, jack man, back grey washers, swing men, inspectors, pressmen, assistants, apprentices, and helpers in the print shop. During the hearing it stated that it sought a departmental unit of printing

4. It is noted that most of the pages of the stenographic transcript of the hearing are misnumbered in that there is no page numbered 23.

Briefs filed by the Employer and by the Intervenor (see footnote 5, *infra*) have been duly considered. The Petitioner did not file a brief, but did file a letter stating that it still adhered to its unit position taken at the hearing and that it did not contend that the Intervenor's contract is not a bar as to the employees covered by it.

5. Machine Printers and Engravers Association of the United States was permitted to intervene at the hearing on the basis of a contractual showing of interest.

department employees[6], either including or excluding those covered by the Intervenor's contract[7]; subsequently changed this to a unit of such employees of the printing department and the color department; and, alternatively, stated that if the unit sought was held to be inappropriate it would accept a unit of all production and maintenance employees[8] or any other unit found to be appropriate. The Intervenor takes no position as to the appropriate unit, except to contend that its contract is a bar to an election among the employees it covers, and does not seek to participate in any election. The Employer contends that a production and maintenance unit, excluding those covered by the Intervenor's contract, is the only appropriate unit. There is no collective bargaining history with respect to any of the employees except those covered by the Intervenor's contract. Such contractual relationship has existed since 1962, when the Employer's plant opened, and a similar relationship existed prior to that date when the plant was located at New Bedford, Massachusetts.

Cloth is received in the Employer's receiving department and then stored in the greige room until needed. It is then taken into the layout room, where the bales[9] are opened and the cloth laid out and sewn together to make a continuous roll. The cloth then goes through a machine

6. The printing department is often referred to as the print room.

7. The Intervenor is party to a collective bargaining contract with the Employer effective from August 1, 1968 through July 31, 1969, covering a unit of all machine printers, including journeymen, apprentices, foremen and assistant foremen. For reasons set forth hereinafter, I deem it unnecessary to make a determination as to whether said contract is a bar to an election among such employees.

8. Again, the Petitioner would accept such unit either including or excluding the employees covered by the Intervenor's contract.

9. Although some of the cloth is received in rolls, most of it comes in bales.

where excess lint and fuzz is singed off and then goes into a de-size bath to remove the starch and sizing. This is followed by caustic and peroxide baths, a washing and the final stages of whitening. It then goes into the white storage bins. From there the cloth goes into the white department where it is dried, "framed" to the proper width, and put on rolls and ticketed with lot numbers. From there it goes into the white storage room, the dye house, or the napping room, depending upon the requirements of the order involved; the largest percentage going into the white storage room, where it stays until such time as the particular lot is scheduled for printing. At that time an employee (roll boy) from the printing department trucks the cloth rolls into the print room for printing. The printed and dried cloth is deposited into boxes, which are then removed and pushed by a print room employee into the developing department for ageing and soaping, after which the printed cloth goes to the finishing department where it goes through starches or resins, depending upon the orders, and is finished by sanforizing or otherwise. Thereafter it is packed and otherwise prepared for shipping.

Although not entirely clear, it appears that the Employer's production operations are carried on by the following departments, each of which is headed by a superintendent (and some of which have other supervisors also): receiving, bleach room, dyeing, white room, printing, finishing, color, chrome or engraving, napping, and put-up and packing. There is also a lab and color manufacturing department, a strike-off department or section, a sample department, and a maintenance department. In addition, there is a somewhat recently established screen

printing department which, for lack of orders, was not operating at the time of the hearing.[10]

The functions of the receiving, bleach room, dyeing, white room, printing, napping, and finishing departments have been indicated by the description above as to the various processes involved. The color department prepares the coloring material for use by the print room. The put-up and packing department appears to handle the shipping function together with the related operations of preparation for shipping. The chrome or engraving department prepares the printing rollers used on the printing machines in the print room. The lab and color manufacturing department, includes two lab technicians, who perform routine tests on cloth. The color manufacturing function (which is separate and distinct from the color room or department) is not clear, nor is that of the strike-off department or section. No party contends that the employees of these departments nor those of the sample department should be excluded from the unit of all production and maintenance employees.

All production operations are housed under one roof. In general, the various departments are separated from each other by walls. An exception to this is that the print room and the color department are within the same area, with the printing operations and the color mixing apparently located closely together. However, parts of the printing department functions are performed in separate rooms, as indicated hereinafter.

10. The printing department, or print room, uses eight textile printing machines which appear to print by means of engraved rollers which deposit the coloring material on the cloth. The screen printing department uses a somewhat new machine process of applying the coloring material by means of screens. The said department is physically and administratively separate from the printing department.

All employees, regardless of department, are under the same labor policies, which are set by the plant manager. All work the same shift hours[11]; use the same plant entrances and exits, parking facilities, timeclocks, rest rooms and break areas, and vending machines; and have the same fringe benefits. All are carried on the same payroll and paid with the same type of paychecks and, except for those under the Intervenor's contract, receive approximately the same wages. It appears that all, or virtually all, are hourly paid.

The various classifications originally named in the petition as constituting the unit sought are all located in either the printing department or the color department.[12] The printing department personnel includes the following classifications: roll boys, journeymen printers and apprentices, back tenders, color dippers, swing men, back greige washers, tub and box washers, jack operators, and clean-up men. The color department classifications are kettle man and color mixers. With respect to the printing department classifications, the roll boys (one per shift) hand-truck the rolls of cloth from the white room department into the printing department. According to uncontradicted testimony, they take their breaks in the white room department and spend any spare time there. However, they are charged to the printing department, are under the supervision of printing department supervisors, and report for work to the printing department before going to the white room department to obtain cloth. The back tenders sew

11. Some departments work on a three-shift basis; others only one. Two or three of the departments have lunch break times, whereas in the others the employees eat at their machines or job stations.

12. The petition as filed indicated that all are in the printing department. As stated hereinabove, the Petitioner eventually sought a unit of both departments.

the newly-arrived cloth to that already running on the machines, and then feed the cloth into the printing machines. Journeymen printers and apprentices, who are covered by the Intervenor's contract and are considered to be craftsmen, operate the printing machines. Color dippers are part of the three-man crews which operate each printing machine; the other two being the journeyman (or apprentice) printer and the backtender. The color dippers observe the boxes of coloring material on the printing machines and refill them as needed. They have nothing to do with the makeup of the color or the composition of the shade. The swing men[13], two per shift, remove full boxes of cloth that has been printed and dried, replace them with empty boxes, push the full boxes from the printing department into the developing and finishing storage area for ageing and soaping, and bring empty boxes back to the printing department. They are under the supervision of the printing department supervisors, and are considered as a part of that department. Like the roll boys, and the color dippers, they can be trained in a matter of hours. The back greige washers are said to work in a separate room, where they wash the back greige, which is then pushed into the ageing and soaping areas.[14] The tub and box washers also work in a separate room, where they wash the color tubs and boxes. They, too, can be trained in a day or less. The jack men work, in part, in an area that is separated by a wall from the print machines; said to be in the same area as the white room. They ascertain what patterns are

13. The Petitioner unsuccessfully sought to establish that they are also called inspectors. This was denied without contradiction.

14. The greige is the cloth prior to printing. This function of washing the back greige (which appears to indicate that it is the greige at the back, or feed-in, end of the printing machine) does not appear to fit into the general description of the processing given above, and the function of pushing greige into the ageing and soaping areas seems to be that of the swing men.

to be printed on the printing machines, then select and remove from the storage rack the appropriate roller, place it on a jack, move it to the printing machine, and remove the roller already on the machine and replace it with the new one.

In addition to the foregoing indications of work contact between the printing department employees and other departments, it was testified without contradiction that white room employees go into the printing department an estimated three to five times daily, to check on what cloth will be needed so they can get it in position for the roll boy to transport it to the printing department, and that the chrome man from the chrome or engraving department similarly checks to see what patterns will be run so that he can prepare the proper rollers.[15]

Some of the printing department job functions are duplicated in other departments. Thus, there are roll boys in the finishing and the put-up departments who perform work similar to that of the printing department roll boys. Similarly, the machine feeding function of the back tenders are found in every department where there are machines, including specifically the napping department, dyeing department, bleach room, and finishing department. All are said to have the same skills.

According to the Employer's assistant plant manager, there is a very substantial transfer of employees into or out of the printing and color departments; approximately one-third of the employees having been thus transferred. He also testified that there is daily, or very frequent, inter-

15. As indicated hereinabove, the printing is done by means of engraved rollers mounted on the printing machines. The chrome or engraving department personnel engrave the appropriate patterns on the rollers. They also appear to chrome plate the rollers and clean them.

change between such departments and other departments in that employees are thus borrowed to replace absent employees.[16] A printing department employee, testifying as a witness for the Petitioner on the basis of his observations, denied that there was such extensive interchange either on a temporary or permanent basis. According to him, instead of borrowing from another department when a printing department employee is absent, another printing department employee from another shift is called in or asked to work a double shift.

The Petitioner does not contend that the unit sought is a craft unit, and on the record I find that it is not. Instead, the Petitioner seeks a multi-departmental unit, which it contended it could show to be appropriate. No case has been cited by the Petitioner in support of such contention, and it has pointed to no bargaining history on such a basis in other plants of the Employer, its parent, or in the industry. On the contrary, witnesses with many years of knowledge of the industry testified that they know of no instance where such a unit of printing department employees and color department employees exists.[17] Although the Board from time to time has found departmental units to be

16. It was testified that the records showed that in a six year period there had been at least 175 instances of employee interchange from the printing or color department into other departments, or vice versa. It was not clear whether this was intended to refer to such temporary interchange or to permanent transfers. The records were not produced, despite oral requests from the Petitioner's counsel.

17. One of the witnesses was the counsel for the Intervenor, which has collective bargaining contracts covering journeymen machine printers and apprentices in 38 of the 69 or 70 textile printing plants in the nation. Said counsel has represented the Intervenor since 1941.

The Petitioner sought to establish that the printing and the color functions are normally considered to be a single entity. However, the uncontradicted evidence was that although such functions necessarily are closely related, they generally are separate departments.

appropriate in other industries, such departments generally perform operations substantially different from those performed in the rest of the plant, contain all of the particular type of employees in the plant, have a history of separate bargaining, and by custom and practice have come to be regarded as craft-like and separable.[18] The foregoing discussion clearly establishes that the unit sought by the Petitioner herein does not meet such tests. Moreover, the Board has applied the policies of the somewhat-recent *Mallinckrodt* case[19] to cases which do not involve severance from an existing larger unit.[20] Thus, the factors to be considered include: (1) whether the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the function of their craft on a nonrepetitive basis or of employees constituting a functionally distinct department working in trades or occupations for which a tradition of separate representation exists; (2) the history and pattern of bargaining in the industry; (3) the degree of integration of the Employer's production process; and (4) the qualifications of the Union seeking to establish the unit, including its experience in representing employees like those sought. With respect to (1), I have found, *supra* that no craft unit is involved. As set forth hereinabove, there is no evidence that a tradition of separate representation exists. Similarly, with respect to (2), there is no history or pattern of bargaining in the industry on the basis of the unit sought. With respect to (3), I conclude that the Employer's production operations are

18. *Allis-Chalmers Manufacturing Company,* 77 NLRB 719. But cf. *Boeing Airplane Company,* 116 NLRB 1101 (production of motion pictures); *S. D. Warren Company,* 144 NLRB 204 (engineering division); *Bagdad Copper Company,* 144 NLRB 1496 (pit employees of copper mining company).

19. *Mallinckrodt Chemical Works, Uranium Division,* 162 NLRB No. 48.

20. *Timber Products Company Division of Cyprus Mines Corporation,* 164 NLRB No. 109.

closely integrated. With respect to (4), there is no evidence that the Petitioner has any experience whatsoever in representing the type of employees it seeks. Moreover, with the exception of one instance for a short time approximately 25 years ago, there is no indication that any other subordinate bodies of the Petitioner's international union have such experience.

On this record, I find that the multi-departmental unit sought by the Petitioner is inappropriate. A production and maintenance unit is inherently appropriate. However, the Petitioner lacks a sufficient showing of interest in such a unit.[21] Accordingly, I shall not direct an election in such a unit. The Petitioner stated that it would accept whatever unit may be found to be appropriate. The record before me does not indicate the appropriateness of any unit other than a production and maintenance unit. I shall therefore dismiss the petition.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

/s/ Walter C. Phillips
Walter C. Phillips
Regional Director, Region 10
National Labor Relations Board

Atlanta, Georgia
November 26, 1968

21. This is true whether or not the employees covered by the Intervenor's contract are deemed to be included. I therefore deem it unnecessary to make a determination as to this issue. For the same reason, I deem it unnecessary to consider in detail the two lab technicians, the six plant clerical employees or the two part-time employees, as to whom it appears there may have been issue between the parties.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1791

LYMAN PRINTING AND FINISHING COMPANY, A DIVISION OF M. LOWENSTEIN & SONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A43-44) is reported at 437 F. 2d 1356. The Board's decision in the unfair labor practice proceeding (Pet. App. A9-42) is reported at 183 NLRB No. 105. Its decision in the related representation proceeding is set forth at Pet. App. A1-8.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1971. The petition for a writ of certiorari was filed on June 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board abused its discretion to determine appropriate collective bargaining units by concluding that the Company's print department employees constituted an appropriate unit.
2. Whether the Board properly refused to allow relitigation in the unfair labor practice case of issues decided in a prior representation proceeding.
3. Whether the Board properly denied the Company's request for discovery in the unfair labor practice proceeding.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations are set forth at Pet. App. A46-47, and A52-54.

STATEMENT

Petitioner employs approximately 3200 employees at its Lyman, South Carolina, plant, where it is engaged in the decorating and fabricating of textile products (R. 4, 125, 180).[1] In October 1968, the

[1] "R." refers to the appendix to the briefs in the court below.

Machine Printers and Engravers Association of the United States ("the Union") petitioned the Board for certification as the bargaining representative of the remaining employees in the Printing Department whom it did not already represent.[2] The Company contested the unit sought, contending that the only appropriate unit was one consisting of all the production and maintenance employees, exclusive of those employees already represented by the Union (R. 4-5, 18-19). Pursuant to Section 9(c)(1)(A) of the Act, 29 U.S.C. 159(c)(1)(A), a hearing was held on the petition,[3] at which the following evidence was adduced:

Approximately one-third of the Company's production consists of printed textile goods, the remaining production being equally divided between unprinted white goods and solid colored dyed goods (R. 250, 293). The Print Division consists of the Print, Color, Age and Soap, and Engraving Departments, and the Screen Print Department, which is located in a separate building with its own separate color shops (R. 324). Each of the five departments is under separate supervision (R. 324). The Print Department and the Color Department are located adjacent to each other, physically separated from the remainder of the plant (R. 353). Employees in these two de-

[2] The Union already represented employees in the Company's Engraving Department on a departmental basis and the printers in the Printing Department on a craft basis (R. 125, 183-184).

[3] At the start of the representation hearing, the Union amended its unit request to include the Company's Color Department employees (R. 181-182).

partments punch separate timeclocks, and share lunchroom, restroom, and locker facilities apart from the other employees (R. 322-323, 353).

The actual printing is done on 22 machines, by approximately 70 printers working on 3 shifts (R. 252, 353). Each machine is operated by an apprentice or journeyman printer who is responsible for the proper execution of the pattern (R. 200, 293). Seven years' experience as an apprentice is necessary to become a journeyman (R. 202, 406-407). In addition to the printers, there are approximately 162 other employees who aid in printing the cloth (R. 326, 425). The Color Department consists of 75 employees (R. 294, 425), who spend 5 or 10 percent of their working time delivering dyes to the print machine, but have no other working contact with the Print Department (R. 331). There is no substantial interchange on a continuing basis between the Print Department employees and other plant employees (R. 433-437, 460).

The terms and conditions of employment of employees in the Print and Color Departments are essentially similar to those of all other production and maintenance employees (R. 304-305). However, when the printers have an additional holiday pursuant to their collective bargaining agreement, the entire Print Department does not work but the remainder of the plant employees do (R. 282). The average rates of pay within the Print Department and the Color Department are generally higher than the average rates in the balance of the Company operations (R. 283). In addition to departmental

seniority observed throughout the plant, the Company maintains a promotion policy applicable only to the Print Department employees (R. 351, 430). Employees in the Print Department can advance to printers classification, in line with the industry practice to recruit apprentice printers from the "back tenders" (R. 191, 203, 278).[4]

Upon these facts, the Board found that all of the Print Department employees constituted an appropriate bargaining unit; accordingly the Board directed that, if the majority of the unrepresented employees in that Department voted for the Union, the Union could bargain for them together with the other Print Department employees which it already represented (Pet. App. A7).[5] The Union won the ensuing election and was certified as the collective bargaining representative for all the employees in that unit (R. 127, 42).

Petitioner refused to bargain with the Union, and an unfair labor practice complaint issued alleging that the refusal violated Section 8(a)(5) and (1) of the Act. In its response to the Trial Examiner's order to show cause why a motion for summary judgment should not be granted, the Company contended, *inter alia*, that it was entitled to a hearing

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[4] A "back tender" attaches the cloth to the printing machine and sees that the cloth runs properly into the machine (R. 327).

[5] The Board denied the Company's Motion for Reconsideration, Rehearing and Stay of Election, on the ground that "it contain[ed] nothing not previously considered by the Board" (R. 11, 126).

on the unfair labor practice as a matter of right, that there were inconsistencies in the Board Decision and Direction of Election that required a hearing, and that the unit found by the Board was not appropriate (R. 74-116). In connection with its response, the Company filed (1) an application for subpoenas *duces tecum*; (2) an application to take depositions; and (3) a motion for leave to direct interrogatories to the Board panel which made the unit determination, the Board's Regional Director, and the Company's General Manager (R. 116-120). The Trial Examiner denied the Company's requests on the grounds that they amounted to an attempt to obtain pretrial discovery which was not available in Board proceedings, and that, in any event, the information sought was either irrelevant or privileged (Pet. App. A24-39).

The Trial Examiner granted the General Counsel's motion for summary judgment, on the ground that the Company raised no issues that had not previously been litigated and decided by the Board in the representation proceeding (Pet. App. A9-40). The Board affirmed the Trial Examiner's rulings, and ordered petitioner to bargain with the Union on request (Pet. App. A41-42). The court of appeals, in a *per curiam* opinion, enforced the Board's order (Pet. App. A43-44).

ARGUMENT

1. Section 9(b) of the Act, 29 U.S.C. 159(b), empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining

shall be the employer unit, craft unit, plant unit or subdivision thereof." The basic question presented is whether the Board abused this broad authority in finding that a unit consisting of all Print Department employees is appropriate for bargaining purposes at the Company's plant. Such an issue, which turns on the particular facts, does not warrant review by this Court. Moreover, the facts summarized above (pp. 3-5) show that there is rational basis for the Board's determination[6] and that therefore the court below was correct in sustaining it.

Petitioner contends (Pet. 9-10) that the Board ignored its own decisions and rules governing the establishment of separate departmental units. In *Mallinckrodt Chemical Workers, Uranium Div.*, 162 NLRB 387, the Board stated that every relevant factor would be considered when severance of employees from an existing bargaining unit was sought. In the instant case, however, since "[t]here is in fact no severance, and no violence is being done to

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[6] Thus, the Print Department's operation affects only one-third of the Company's total production, and a cessation of production in that department would not shut down the other departments (R. 261). The Print Department has its own separate immediate supervision, a departmental seniority policy with special provisions only applicable to job classifications in the Print Department, and a specific separate physical location. The Print Department employees have somewhat higher wage levels than the other Company employees; its non-craft employees work closely with and functionally support the printers; and there is a line of progression within the department, so that employees are able to go from lower paying classifications to the highest, as they acquire further job skills.

any previously existing bargaining unit" (*Rohm & Haas Co.* v. *National Labor Relations Board*, 362 F. 2d 410, 413 (C.A. 4)), many of the factors deemed relevant in *Mallinckrodt* are absent here. Nevertheless, in accord with the general principle of that decision, the Board, in finding a departmental unit to be appropriate, considered all of the factors which were present here, including the separate functions, skills, and supervision of the employees involved.

2. Petitioner contends that (Pet. 12-13) the Board's refusal to permit it to relitigate the unit determination in the unfair labor practice proceeding constituted a denial of due process. This contention rests on the premise that petitioner had no opportunity to challenge the appropriateness of a Plant Department unit in the representation proceeding because a different unit was litigated at the representation hearing. However, while the Union did add the Color Department to its original request to represent the remainder of the Print Department employees (n. 3, *supra*), the Company, in supporting its contention that only a residual plantwide unit was appropriate, fully developed its reasons for opposing any smaller unit, including a Print Department unit. Moreover, after the Board directed an election in the Print Department unit, the Company, in a motion for reconsideration, rehearing, and stay of election (R. 11-29), apprised the Board at length of its reasons why such a unit was inappropriate. In these circumstances, the Board was justified in foreclosing relitigation of the unit determination in

the unfair labor practice proceeding. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 157-158; *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137.

3. It is unnecessary to determine whether Section 102.30 of the Board's rules (Pet. App. A52-54) provides for pretrial discovery (see Pet. 16), for, even if it does, petitioner's request for such discovery was properly denied. Petitioner sought—by means of its requests for subpoenas, depositions, and interrogatories—essentially to show that the Board members, in reaching their decision, "arbitrarily and capriciously ignored certain facts in the record and substantially departed from established Board precedent" (Pet. App. A27). In short, petitioner was seeking to probe the mental processes of the Board members. A subpoena or discovery procedure cannot be used to inquire into this privileged area. See *Morgan* v. *United States*, 304 U.S. 1, 18, and 313 U.S. 409, 422; *Davis* v. *Braswell*, 363 F. 2d 600, 604 (C.A. 5).[7]

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[7] The hearing officer's report, which petitioner also sought to discover on the ground that it contained important recommendations to the Board (Pet. 18), is not part of the record in a representation proceeding (see 29 C.F.R. 102.68), because it is merely a summary of the issues and the evidence. Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), specifically bars the hearing officer from making "any recommendations" with respect to how the questions presented shall be decided by either the Board or the Regional Director.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1971.

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